90-1104 (5)

No.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

N.A.A.C.P., DETROIT BRANCH; THE GUARDIANS, INC. BRADY BRUENTON; CYNTHIA MARTIN; HILTON NAPOLEON; SHARRON RANDOLPH; BETTY T. ROLLAND; GRANT BATTLE; CYNTHIA CHEATOM; EVIN FOBBS; JOHN H. HAWKINS; HELEN POELNITZ, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

vs.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); DAVID WATROBA, PRESIDENT; CITY OF DETROIT; COLEMAN A. YOUNG, MAYOR; DETROIT POLICE DEPT.; BOARD OF POLICE COMMISSIONERS; WILLIAM HART, CHIEF,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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January 9, 1991

INDEX TO APPENDIX

Page	Date	Item
A-1	11/17/81	District Court Opinion Granting Partial Summary Judgment to Plaintiffs *NAACP v. DPOA*, 525 F. Supp. 1215 (E.D. Mich. 1981)
A-14	1/25/82	District Court Order on Collateral Estoppel *NAACP v. DPOA*, (Slip Opinion)
A-16	11/28/83	District Court Opinion Granting TRO to Plaintiffs w/r/t Recall Rights of Black Officers *NAACP v. DPOA*, (Slip Opinion)
A-19	12/1/83	Stipulation, Order Amending 11/28/83 TRO to Include Recall Rights of All Officers *NAACP v. DPOA*, (Slip Opinion)
A-21	2/24/84	District Court Opinion Granting Partial Summary Judgment to Plaintiffs on Issue of Continuing Affirmative Remedial Duty *NAACP v. DPOA*, (Slip Opinion)
A-23	7/25/84	District Court Liability, Remedy Opinion *NAACP v. DPOA*, 591 F. Supp. 1194 (E.D. Mich. 1984)
A-79	10/21/85	District Court Opinion Awarding Fees, Costs *NAACP v. DPOA*, 620 F. Supp. 1173 (E.D. Mich. 1985)
A-126	6/8/87	6th Circuit Opinion Reversing Award of Fees, Costs *NAACP v. DPOA*, 819 F.2d 1142 (6th Cir. 1987)
A-128	6/12/87	6th Circuit Opinion Reversing Liability, Remedial Orders of District Court *NAACP v. DPOA*, 821 F.2d 328 (6th Cir. 1987)
A-138	1/13/88	District Court Opinion Denying City Motion for Entry of Judgment and Denying DPOA Motion for Summary Judgment *NAACP v. DPOA*, 676 F. Supp. 790 (E.D. Mich. 1988)
A-158	6/15/88	District Court Opinion Dismissing Case as Moot *NAACP v. DPOA*, 685 F. Supp. 1004 (E.D. Mich. 1988)
A-165	10/11/88	District Court Remand Fee Opinion *NAACP v. DPOA*, 696 F. Supp. 1145 (E.D. Mich. 1988)
A-176	4/9/90	6th Circ. Opinion Reversing Mootness, Ordering Dismissal on Other Grounds *NAACP v. DPOA*, 900 F.2d 903 (6th Cir. 1990), and Order Denying Rehearing
A-200	9/27/90	6th Circuit Opinion Reversing Fee Award *NAACP v. DPOA*, 914 F.2d 1494 (6th Cir. 1990)

Opinion

N A.A.C.P., DETROIT BRANCH, et al.

v.

DETROIT POLICE OFFICERS ASSOCIATION, (D.P.O.A.), et al.; CITY OF DETROIT: MAYOR COLEMAN A. YOUNG; et al.

525 F. Supp. 1215 (E.D. Mich. 1981)

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James Zeman, 1010 City-County Building, Detroit, MI 48226, On Behalf of defendant City of Detroit.

OPINION

The controversy in this case can be briefly summarized. In October 1979 and September 1980, the City of Detroit laid off approximately 1100 police officers pursuant to the terms of the last hired/first fired seniority provision contained in Article 10, ¶ E of the 1977-1980 Collective Bargaining Agreement between

the City and the Detroit Police Officers Association ("DPOA"). Of the 1100 officers laid off, approximately 800 were black.

On September 30, 1980, several individual laid-off black police officers and two organizations, the Guardians, a voluntary organization of black police officers, and the NAACP, whose membership includes laid-off black officers, brought this action challenging the layoffs under the 13th and 14th Amendments to the United States Constitution, 42 U.S.C. 1981, 1983, 1985(3), Title VI of the Civil Rights Act of 1964, and Michigan law. Plaintiffs' claim rests on the findings in *Baker v. City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979)[1] in which Judge Keith upheld the City of Detroit's voluntary affirmative action plan as necessary to offset the effects of past discrimination in the Detroit Police Department. Plaintiffs argue that the finding of a constitutional violation in *Baker* imposed an affirmative obligation on the City of Detroit to dismantle and eliminate all effects of these discriminatory policies. They contend that the seniority-based layoffs are constitutionally and statutorily impermissible because they have a discriminatory impact on blacks and operate to revive and reinstitute the effects of Detroit's past illegal hiring practices. The individual plaintiffs also claim that their union, defendant DPOA, breached its duty of fair representation with regard to the layoffs.

The case is currently before the Court on two motions. Defendants DPOA and David Watroba, President of the DPOA, have filed a motion for summary judgment arguing that plaintiffs have failed to state a legally sufficient claim, and that defendants are entitled to judgment as a matter of law under all counts of the complaint. In addition, defendant DPOA challenges the standing of the two organizational plaintiffs, NAACP and the Guardians. Finally, the DPOA requests that, if summary judgment is granted in their favor, the Court bifurcate the case into

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[1] Baker is presently on appeal but has not yet been decided by the United States Court of Appeals for the Sixth Circuit.

liability and remedy stages, and they be permitted to intervene at the remedy stage.

Plaintiffs have moved for partial summary judgment. They argue that the doctrine of collateral estoppel precludes relitigation of the issue of the City's past intentional discrimination as found in *Baker v. City of Detroit, supra.* Further, plaintiffs contend that, in light of *Baker*, the City was under a continuing duty to remedy the effects of prior unconstitutional hiring policies.

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Standing

The first issue raised by defendants DPOA and Watroba in their motion for summary judgment is whether the two organizational plaintiffs—the NAACP and the Guardians—have standing to sue. The defendants contend that the Court's certification of a class of black police officers precludes the participation of the associations as representatives of their members because the claims asserted and the relief requested make the involvement of the individual officers indispensable to a proper resolution of the case.

There is no question that an association may obtain standing to sue in different capacities. It has standing on its own behalf to seek relief from injury to itself, and it also may have standing solely as the representative of its members, even in the absence of injury to itself. *Warth v. Seldin*, 422 U.S. 490 (1975); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

In order to obtain standing as a representative of its members, an association must meet certain prerequisites. In *Warth*, the Supreme Court held:

The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of

the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members. . . . " 422 U.S. at 511.

Defendants argue that the organizational plaintiffs' effort to acquire standing in their representative capacity must fail because the relief sought includes reinstatement and back pay. Since this relief would only benefit the individual class members, defendants assert that the organizational plaintiffs have failed to meet the requirements of Warth.

The Court does not agree. First, the defendants have mistakenly interpreted the Guardians' posture as that of a representative of its members. The Guardians is a voluntary association of black police officers. It has alleged that it has suffered diminished financial support and loss of membership as a result of the challenged layoffs. These losses clearly affect its ability to function as an effective organization within the police department. In short, Guardians has alleged a distinct injury to itself. These allegations of injury to itself, as an association, are sufficient to establish standing. See *Warth, supra*. Thus, the Court need not inquire into whether the association has met the requirements for representational standing. Clearly the Guardians has established sufficient standing.

The second organizational plaintiff, NAACP, seeks standing as a representative of its members. Thus, it may obtain standing only if "neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." *Hunt, supra*, at 343. In determining whether an action requires the participation of individual members, the Supreme Court has been primarily concerned with the problems of individualized proof. In *Hunt, supra*, the Court upheld the association's right to sue on behalf of its members after finding that "neither the

interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context." 432 U.S. at 344.

The instant case is primarily one for injunctive relief which will not require individualized proof. Plaintiffs' prayer for relief states, in pertinent part:

> "2. That this Court enjoin the operation of the seniority provisions of the Collective Bargaining Agreement between the City and the DPOA to the extent that the agreement would prevent the City from meeting its affirmative obligation to correct its constitutional violations;
>
> 3. That this Court enjoin the DPOA from obstructing the City in its remediation efforts;
>
> 4. That this Court order defendants City and Police Department to reinstate all minority officers who were illegally laid off as a result of the strict adherence to the seniority system;
>
> 5. That the defendants pay the reinstated officers their back pay with interest."

The central issue is whether this Court has the power to alter the effects of an allegedly racially neutral seniority system and compel the layoff of employees in a manner that does not jeopardize the racial balance achieved through a voluntary affirmative action program.[2] The issue of back pay, should it arise, simply requires a mechanical, mathematical computation. Such computations may be performed after liability is established. Cf. *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976).

Since the plaintiffs have requested predominately injunctive relief, and since the basic liability issues can be appropriately resolved in a group context, the participation of the individual

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[2] It should be noted that the final order entered by Judge Keith requires the defendant City of Detroit to continue its affirmative action program within the Police Department.

members of the NAACP is not indispensable to a proper resolution of this case. Thus, the NAACP has standing to assert the claims of its members.

Therefore, for the reasons given above, the defendants' motion for summary judgment as to the standing of the NAACP and the Guardians is denied.

B. Plaintiffs' Duty of Fair Representation Claim

Plaintiffs' principal claim against defendant DPOA is that the Union breached its duty of fair representation under State law by discriminating against its black members. Plaintiffs argue that the DPOA discriminated against its black members by insisting on enforcing, and refusing to consider alternatives to enforcing, the seniority-based layoff system, knowing that this would perpetuate the effects of past hiring discrimination.[3] Defendant DPOA has moved for summary judgment, arguing that it cannot be liable because it did not act in an arbitrary manner, and that the layoffs in the instant case took place pursuant to a properly negotiated color-blind collective bargaining agreement.

It is clear that the DPOA, as the exclusive bargaining agent for the police, has a duty of fair representation under Michigan law. See *Lowe v. Hotel Employees' Union, Local 705*, 389 Mich. 123 (1973); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). This case raises novel questions concerning that duty.

The duty of fair representation is breached when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967). Thus the duty of fair representation insures that the interests of individual members and specific groups

[3] See discussion infra where the City of Detroit has admitted past hiring discrimination against blacks in the Police Department.

within the union are protected. See *Steele v. Louisville and Nashville R.R. Co., supra.*

Plaintiffs assert that this duty requires the Union to affirmatively protect (or at least to attempt to protect) their minority members from disproportionate layoffs through a "last hired-first fired" seniority system, even if the system is considered bona fide under Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000e. They claim that the DPOA's history and conduct with respect to these layoffs amounts to discrimination along "irrelevant and invidious" lines in violation of the duty of fair representation as defined in *Steele, supra.* Plaintiffs contend that the DPOA's refusal to make concessions to avert layoffs, coupled with the DPOA's consistent opposition to affirmative action establishes a prima facie case of racial discrimination against blacks. See *Brown v. Neeb*, 644 F.2d 551, 564 n. 25 (6th Cir. 1981).

Plaintiffs point to several exhibits which they believe evidence the DPOA's discriminatory intent in violation of the duty of fair representation. They point, for example, to exhibit 2 of plaintiffs' complaint, which is a letter dated September 2, 1980, from the Guardians to Defendant Watroba. In this letter, the Guardians urged the DPOA to accept Mayor Young's offer to discuss other options in order to avoid the layoffs. Plaintiffs assert that the DPOA never responded to this letter and in fact had no intention of bargaining in good faith to avert the layoffs. They suggest that the DPOA was motivated to accept the layoffs in order to reduce black voting strength within the union.

Plaintiffs also contend that the DPOA's behavior regarding subsequent layoffs is evidence of the union's intent to discriminate in violation of the duty of fair representation. Specifically, in June 1981, when faced with proposed layoffs that were not as disproportionately black as the 1979-1980 layoffs, the DPOA agreed to a wage freeze in order to avert the layoffs, and arranged for an advisory vote in the union on the acceptability of this concession.

Opinion

Defendant DPOA raises two basic arguments. It claims, first, that its conduct in agreeing to and maintaining a bona fide seniority system does not violate Title VII but, indeed, is mandated by Title VII. Thus DPOA says its conduct regarding layoffs cannot violate the duty of fair representation. Second, DPOA maintains that, if it accepted plaintiffs' proposal, it would be sacrificing contract rights of the majority of its members in favor of a minority in the membership, thus violating its duty of fair representation to the majority members.

Defendant maintains that plaintiffs have alleged no facts which, if true, would show that defendants intentionally discriminated against its black members in violation of the duty of fair representation. Defendant argues that the union may agree to terms of a contract which affects individuals differently so long as the union treats the members in a nondiscriminatory, nonarbitrary fashion. The DPOA insists that it has always acted in good faith.

Although the defendant contends that there are no facts indicating that it acted in an arbitrary or discriminatory manner, the Court feels that plaintiffs have produced several exhibits which raise questions of fact concerning the union's behavior.

It appears to the Court that the issue in the instant case is one of first impression, and that plaintiffs have raised sufficient factual claims and issues to preclude the granting of summary judgment at this time. The Court is not currently deciding whether § 703(h) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(h), which insulates bona fide seniority provisions from attack under Title VII, has any impact on the union's duty of fair representation. Such a decision could not properly be made until the development of a full factual record. Defendant's motion for summary judgment on plaintiffs' claim of a breach of the duty of fair representation is therefore denied without prejudice pending the development of a complete factual record.

C. Plaintiffs' claim under the 13th and 14th Amendments to the U.S. Constitution, 42 U.S.C. §§ 1981, 1983, 1985(3) and Title VI of the Civil Rights Act of 1964.

Defendants have moved for summary judgment on the ground that plaintiffs have failed to state legally sufficient claims under the 13th and 14th Amendments, 42 U.S.C. 1981, 1983, 1985(3) and Title VI of the Civil Rights Act of 1964. It is clear that a legal summary judgment is not proper at this time. Judgment on the issues raised in this motion must be deferred until a more complete factual record is developed.

II. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs' motion for partial summary judgment requests that the Court grant the following declaratory relief:

> "That in the light of *Baker v. City of Detroit*, 483 F. Supp., 930 (E.D. Mich. 1979), the City of Detroit has violated the Constitutional rights of blacks and therefore has an affirmative obligation to completely dismantle all aspects of the Detroit Police Department's intentionally discriminatory hiring policies, and eliminate all the effects of those policies." (Plaintiffs' brief, p. 1).

Plaintiffs maintain that the doctrines of collateral estoppel and stare decisis preclude relitigation of the issue of the City's past intentional discrimination as found in *Baker, supra.*

Defendant City of Detroit does not oppose plaintiffs' motion. In fact, the City openly admits the history of past discrimination found in *Baker*. Defendants DPOA and Watroba oppose plaintiffs' motion on several grounds. They argue they cannot be collaterally estopped by *Baker* because they were not parties to the litigation in *Baker*. They also claim that *Baker* cannot operate as collateral estoppel because the case is currently on appeal, and they contend that the findings in *Baker* were findings of "mediate" fact which cannot be the subject of collateral estoppel. Finally, defendants maintain that *Baker* had several

alternative holdings and therefore cannot be given estoppel effect.

The threshold issue is whether collateral estoppel can be used at all since defendants DPOA and Watroba, as well as defendants Milliken and the Michigan Employment Relations Commission were not parties to the *Baker* litigation. The defendants argue that due process prohibits the use of collateral estoppel against those who were not parties to the prior action, and rely upon *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), where the Court stated:

> "Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stands squarely against their position." 402 U.S. at 329.

On the other hand, plaintiffs have cited several cases in support of the proposition that collateral estoppel can be applied without abridging the due process rights of the DPOA and other defendants who were not parties in *Baker*. For example, in *Bradley v. Milliken*, 484 F.2d 215 (6th Cir. 1973), *rev'd on other grounds, Milliken v. Bradley*, 418 U.S. 717 (1974), the District Court found that the City of Detroit had a de jure segregated public school system and ordered cross-district bussing involving 53 other school districts. On review, the Sixth Circuit ruled that the nonparty school districts had a right to be heard. However, the Court stated: "[T]he District Court will not be required to receive any additional evidence as to the matters contained in its Ruling on the Issue of Segregation . . ." 484 F.2d at 252.[4]

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[4] Defendant DPOA argues that Bradley is distinguishable because the Court noted that the school districts were instrumentalities of the State, which was a party in the original case. However, the Court's statement that the local districts were instrumentalities of the state referred to the districts' ability to be sued as parties defendant.

Accord, United States v. Board of School Commissioners, 503 F.2d 68 (7th Cir. 1974). Thus, in effect, the new parties were estopped from relitigating the issue of de jure segregation with regard to the Detroit School System. The new defendants could only present evidence on the issue of their own culpability.

DPOA's position with respect to the relief requested by plaintiffs is analogous to the situation found in the above cited school desegregation cases. The *Baker* court found that the City of Detroit was guilty of intentional discrimination in violation of the 14th Amendment through at least 1967-68, and of discrimination in violation of Title VII until 1974. Plaintiffs' motion asks this Court to accept these findings for the purpose of the present action. The City of Detroit concedes that it discriminated as found in *Baker*. The issue raised in the present case is whether, and to what extent, the City had a duty to remedy the effects of those discriminatory processes.

A finding that *Baker* acts as collateral estoppel is relevant only to the City's liability. It says nothing about whether DPOA is guilty of violating plaintiff's rights. To hold that *Baker* estops this Court from relitigating the question of the City's past discriminatory practices does not deprive the DPOA of its due process rights. Plaintiffs' complaint against the DPOA argues that the DPOA had a duty to remedy the past discrimination practiced by the City. In order to establish the DPOA's liability, plaintiffs will have to produce evidence regarding the DPOA's knowledge, behavior, and participation in the challenged layoffs. Thus, use of collateral estoppel is appropriate here, assuming the requirements for the application of the doctrine are met, because the parties will only be estopped from relitigating the finding of past discrimination by the City of Detroit, —a fact which has been admitted.

Under the doctrine of collateral estoppel, "the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979). The *Baker*

decision must be examined to determine whether it actually and necessarily held, as plaintiffs claim, that the City was guilty of race discrimination in violation of Title VII and the 14th Amendment.

In *Baker*, several white police officers brought suit challenging the City's affirmative action promotion plan under Titles VI & VII of the Civil Rights Act of 1964, and 42 U.S.C. §§ 1981 and 1983. The Court held that the City was in violation of Title VII from 1972 to 1974 because it used discriminatory tests in granting promotions. In order to determine whether the race-conscious affirmative action plan was constitutional, the Court subjected the plan to strict scrutiny under the 14th Amendment and held that the City was guilty of intentional discrimination from 1967 to 1968 in its use of hiring tests and the use of subjective criteria in hiring. The Court also found that statistical evidence proved the existence of race discrimination. It upheld the race-conscious promotion plan on the basis that the City had a duty to remedy the effects of its past discrimination. Thus, the finding of past discrimination in hiring, which is relevant to the present case, was an actual and necessary holding in *Baker*.

Defendant DPOA argues *Baker* cannot operate as collateral estoppel because the case had several alternative holdings. However, the alternative holdings in Baker are independently sufficient to support the judgment. Thus, collateral estoppel may be used in a subsequent action. See *Winters v. Lavine*, 574 F.2d 46 (2d Cir. 1978).

Defendant DPOA also contends that *Baker* cannot estop this Court because it is on appeal and therefore is not a final judgment. However, a judgment is final for purposes of res judicata and collateral estoppel if it makes a "currently effective disposition of the issues raised." *Overseas Motors, Inc. v. Import Motors Limited, Inc.*, 375 F.Supp. 499, 517 (E.D. Mich. 1974). Thus, the pending appeal in *Baker* has no effect on the application of collateral estoppel in the instant case.

Finally, DPOA argues that the relevant findings in *Baker* were findings of "mediate" fact which cannot operate as collateral estoppel, citing *Overseas Motors, Inc. v. Import Motors Limited, Inc.*, 375 F.Supp. 499 (E.D. Mich. 1974) in support of its argument. Defendants' reliance on this case is misplaced. The Court in *Overseas Motors* expressly noted that the use of the "mediate fact—ultimate fact" distinction had "little support in policy or logic." *Id.* at 523. The reason behind such a restriction on collateral estoppel is to prevent the use of prior determinations to support unforeseeable inferences in the subsequent litigation. Clearly, the problem of unforeseeable inferences discussed in *Oversees Motors* has no bearing on the instant case.

For the reasons given above, the doctrine of collateral estoppel precludes relitigation of the issue of the City's past intentional discrimination as found in *Baker*. However, the Court, at this stage of the proceedings, will not make the ultimate finding requested by plaintiffs as to whether the City has "an affirmative obligation to completely 'dismantle all aspects of the Detroit Police Department's intentionally discriminatory hiring policies, and eliminate all the effects of these policies." The finding of collateral estoppel on the issue of past racial discrimination by the City does not require the Court to go that far. The determination of whether such a finding will be made on that issue must await the development of a full factual record. Thus, plaintiffs' motion for partial summary judgment is granted in part. Orders in conformity with this opinion may be presented.

Opinion

Civil Action No. 80-73693

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

N.A.A.C.P., DETROIT BRANCH, ET AL., *Plaintiffs*	
v.	JUDGE HORACE W. GILMORE
DETROIT POLICE OFFICERS ASSOCIATION (DPOA), ET AL., *Defendants*	

ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

At a session of said Court held in the Federal Building in the City of Detroit, Michigan on the 25th day of January, 1982.

PRESENT: ..... HORACE W. GILMORE .....
U.S. District Judge

Plaintiffs' Motion for Partial Summary Judgment having on for hearing, and this Court having considered this Motion, Briefs, and the arguments presented, and being fully advised in the premises;

IT IS HEREBY ORDERED that consistent with this Court's Opinion dated November 17, 1981, the Plaintiffs' Motion for Partial Summary Judgment is granted to the extent the doctrine of collateral estoppel precludes a relitigation of the issue of the City of Detroit's past intentional discrimination as found in *Baker* v. *City of Detroit*, 483 F Supp 930 (ED Mich 1979).

Opinion

HORACE W. GILMORE
U.S. District Judge

Approved as to form:

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Opinion

No. 80-73693

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

N.A.A.C.P., ET AL., *Plaintiffs*	)	
v.	)	HON. HORACE GILMORE
D.P.O.A., ET AL., *Defendants*	)	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTIONS FOR TEMPORARY AND PRELIMINARY RELIEF

At a session of said Court held in the U.S. Courthouse, City of Detroit, County of Wayne, Michigan on this 28th day of November, 1983

PRESENT: ..... HON. HORACE W. GILMORE .....
U.S. District Court Judge

This matter having come on for hearing on Plaintiffs' Motions for Temporary Restraining Orders Regarding Lay offs and Regarding Recall Rights, and this Court having considered the briefs and arguments of counsel,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Temporary Restraining Order Regarding Lay offs is denied for the reasons stated by the Court at the hearing on September 7, 1983; and

IT IS FURTHER ORDERED that Plaintiffs' Motion for Temporary Restraining Order Concerning Recall Rights is granted for the reasons stated by the Court at the hearing on

September 7, 1983, and that pending the outcome of this litigation the Defendant City is enjoined from allowing the recall rights of any class member to lapse.

HORACE W. GIMORE

HONORABLE HORACE GILMORE
U.S. District Court Judge

Dated: November 28, 1983

Approved as to Form:

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Opinion

No. 80-73693

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

N.A.A.C.P., ET AL., *Plaintiffs*	
v.	HON. HORACE GILMORE
D.P.O.A., ET AL., *Defendants*	

STIPULATION AND ORDER AMENDING THE NOVEMBER 28, 1983 ORDER

It is hereby stipulated between the parties that the Order Granting in Part and Denying in Part Plaintiffs' Motions for Temporary and Preliminary Relief approved as to form by all parties and entered by this Court on November 28, 1983 was incorrect inasmuch as it limited the injunction against the Defendant City with regard to the lapsing of recall rights to only class members. The Court had enjoined the Defendant City on September 7, 1983 from allowing the recall rights of any laid off officer to lapse.

It is therefore stipulated by the parties that an order reflecting this change should be entered.

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Jeanne Mirer
Attorney for Plaintiffs

FRANK JACKSON
Frank Jackson
Attorney for Defendant City of Detroit

WALTER NUSSBAUM
Walter Nussbaum
Attorney for Defendant DPOA

Opinion

No. 80-73693

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

N.A.A.C.P., ET AL., *Plaintiffs*	)	
v.	)	HON. HORACE GILMORE
D.P.O.A., ET AL., *Defendants*	)	

AMENDED ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTIONS FOR TEMPORARY AND PRELIMINARY RELIEF

At a session of said Court held in the U.S. Courthouse, City of Detroit, County of Wayne, Michigan on this 1st day of December, 1983

PRESENT: ..... HON. HORACE W. GILMORE
U.S. District Court Judge

This matter having come on for hearing on Plaintiffs' Motions for Temporary Restraining Orders Regarding Lay offs and Regarding Recall Rights, and this Court having considered the briefs and arguments of counsel,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Temporary Restraining Order Regarding Lay offs is denied for the reasons stated by the Court at the hearing on September 7, 1983; and

IT IS FURTHER ORDERED that Plaintiffs' Motion for Temporary Restraining Order Concerning Recall Rights is granted for the reasons stated by the Court at the hearing on

September 7, 1983, and that pending the outcome of this litigation the Defendant City is enjoined from allowing the recall rights of any laid off police officers to lapse.

HORACE W. GILMORE

HONORABLE HORACE GILMORE
U.S. District Court Judge

Dated: December 1, 1983

Opinion

Case No. 80-73693

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

N.A.A.C.P., ET AL., *Plaintiffs*	
v.	HON. HORACE GILMORE
D.P.O.A., ET AL., *Defendants*	

ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

At a session of said Court, held in the United States District Court for the Eastern District of Michigan, Southern Division, U.S. Courthouse, Detroit, MI on

PRESENT: ..... HONORABLE HORACE GILMORE .....
District Court Judge

This matter having come on for argument on Plaintiffs' Motion for Partial Summary Judgment, and this Court having considered the Motion, briefs, and arguments of counsel,

IT IS HEREBY ORDERED that Plaintiffs' Motion is granted and the Court makes the following declarations:

1. That based upon the findings of intentional discrimination in *Baker* the City had a constitutionally-imposed continuing affirmation obligation not only to stop the discrimination, but to remedy all the affects of that discrimination.

2. That the City had not yet remedied the effects of this prior discrimination when in 1979 and 1980 it reduced black representation of the police force.

3. That by these layoffs, which the City knew full well would reduce the black representation in the police force, the City breached its affirmative obligation to the Plaintiffs, in violation of their rights under the Fourteenth Amendment.

. . . . . .

Horace Gilmore
U.S. District Judge

Opinion

N.A.A.C.P., Detroit Branch; The Guardians, Inc.; Brady Bruenton; Cynthia Martin; Hilton Napoleon; Sharron Randolph; Betty T. Roland; Grant Battle; Cynthia Cheatom; Evin Fobbs; John Hawkins; Helen Poelinitz; on behalf of themselves and all others similarly situated, Plaintiffs,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); David Watroba, President of the DPOA; City of Detroit, a Michigan Municipal Corporation; Mayor Coleman A. Young; Detroit Police Department; Board of Police Commissioners; Chief William Hart; Governor William Milliken; and The Michigan Employment Relations Commission, Defendants.

Civ. A. No. 80-73693.

United States District Court,
E.D. Michigan, S.D.

July 25, 1984.

Black police officers of city of Detroit brought action against city, its mayor, its police department, police commissioner, police chief, and police officers association alleging city had violated affirmative duties imposed by prior findings of constitutional violations and that union had breached its duty of fair representation. The District Court, Gilmore, J., held that: (1) city breached its affirmative and constitutionally mandated duty to remedy past potential racial discrimination when it began its massive layoffs of black officers; (2) breach by city was knowing and intentional; and (3) union breached its duty of fair representation.

Order accordingly.

1. Civil Rights—9.10

Constitutional obligation of city to eliminate continuing effects of past racial discrimination continued to exist at time of massive layoffs of black police officers, where percentage of

blacks in ranks of police officers was 28.3%, in all ranks was 27.9%, and relevant labor market in city was over 65% black.

2. Civil Rights—9.10

City's breach of its affirmative constitutionally mandated duty to remedy past intentional racial discrimination in police department was willful, where city knew that it was under legal mandate to continue its affirmative obligation to black officers and knew that proposed massive layoff would have drastic effect upon its obligation.

3. Civil Rights—13.8(3)

Good faith is not a defense by municipality to a constitutional violation.

4. Civil Rights—13.10

Neither bona fide seniority clauses nor contractual obligations are a defense to Fourteenth Amendment violation in employment situation. U.S.C.A. Const. Amend. 14.

5. Civil Rights—13.16

State law cannot stand in way of full and complete remedies for constitutional violations.

6. Contracts—114

Parties cannot by contract limit their liability for preexisting constitutional violations.

7. Civil Rights—9.10

Where past intentional discrimination by city in hiring of black police officers had been found, city was liable every time it knowingly and foreseeably breached its affirmative obligations to remedy discrimination.

8. Civil Rights—9.10

Labor Relations—219

City does not fulfill its obligation under Fourteenth Amendment, nor does union fulfill its obligations to fairly represent its members, by simply giving difficult problem of redressing racial injustice in society to federal courts.

9. Civil Rights—9.10

In addition to usual losses sustained with loss of employment, class of black police officers suffered injury of betrayal as direct result of city's past racial discrimination and its failure at time of massive layoffs of black police officers to continue to remedy discrimination, where black police officers' standing in community was put in jeopardy by their joining police force, and officers had to face inference that city was playing games with them and was not serious about its efforts to remedy past discrimination.

10. Civil Rights—9.10

Layoffs of approximately 1,100 police officers below rank of sergeant, of which approximately 75% were black, violated not only black officers' constitutional rights, but constitutional rights of black citizens of city.

11. Civil Rights—13.16

Race-conscious remedies are permitted to redress constitutional violations.

12. Civil Rights—13.16

Classwide relief to remedy past constitutional violations is permissible without individual members of class having to prove that they were actual victims of past discrimination.

Opinion

13. Civil Rights—13.16

Race-conscious remedial relief must be both necessary and tailored to cure constitutional violations.

14. Civil Rights—13.16

Appropriate remedy for discriminatory layoff of black police officers by city was reinstatement of all black officers who remained on layoff status and who wished to return, with call back subject to normal procedures of police department pertaining to returning laid-off police officers, with all returned officers to be awarded seniority he or she would have had, if there had been no layoffs.

15. Civil Rights—13.2(1)

In addition to requiring call back of all black police officers laid off by city in massive reduction of police force, court also permanently enjoined city from laying off, suspending, or discharging, except for disciplinary reasons, any black or white police officer without prior approval of court.

16. Labor Relations—219

As exclusive bargaining representative for its members, police union had duty of fair representation under Michigan law.

17. Courts—97(1)

Under Michigan law, court must look to federal law for guidance in deciding whether union breached its duty of fair representation.

18. Labor Relations—219

Duty of fair representation by union is judicially created remedy.

19. Labor Relations—218

By allowing unions to be exclusive representatives of their members, and thus subsuming rights of minorities in collective bargaining, unions have not been granted licenses to practice racial discrimination in violation of either Fourteenth Amendment or equal protection clause of Michigan Constitution. U.S.C.A. Const.Amend. 14; M.C.L.A. Const.Art. 1, § 2.

20. Labor Relations—219

Exclusivity principle of National Labor Relations Act and Michigan labor relations statute is constitutional only if there is duty of fair representation, and that means representation of all members of union; this duty of fair representation is fundamental limitation upon union activity. M.C.L.A. § 423.211; National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

21. Labor Relations—219

Union's obligation under duty of fair representation is analogous to that of fiduciary to principal.

22. Labor Relations—218

Union has higher standard to its members than standard owed by employer to employee.

23. Labor Relations—219

Labor union has no per se obligation to make concessions or give up demands won at bargaining table and in court in order to fairly represent minority members.

24. Labor Relations—219

Police officers union was guilty of breach of its duty of fair representation through its failure to adequately represent interests of black members in layoffs from department, where history of racial hostility and indifference to rights and needs of black

officers existed, blacks were totally unrepresented in leadership levels of union, one-quarter of union membership, one-half of black membership, and loss of approximately $500,000 a year in dues resulted from layoffs, union failed to make any serious efforts to assist black officers, and union had in past acted to avert layoffs of white officers.

25. Labor Relations—769

Where union had breached its duty of fair representation in regard to minority members, and no union governing committee had any black or minority members, appropriate relief consisted of requiring that within 12 months all committees of union, especially grievance and finance committees, board of directors and executive boards, reasonably reflect racial composition of union.

Thomas I. Atkins, Brooklyn, N.Y., Barnhart & Mirer by Jeanne Mirer, Gary Benjamin, James W. McGinnis, Detroit, Mich., for plaintiffs.

Walter S. Nussbaum, Mara Kalnins-Ghafari, Detroit, Mich., for defendants Detroit Police Officers Association, David Watroba, President of DPOA.

Frank W. Jackson, Asst. Corp. Counsel, Detroit, Mich., Daniel B. Edelman, Washington, D.C., Terri L. Hayles, Asst. Corp. Counsel, Detroit, Mich., for defendants City of Detroit, Mayor Coleman A. Young, Detroit Police Department Board of Police Commissioners, Chief William Hart.

OPINION

GILMORE, Judge.

Can the City of Detroit, knowing full well that by laying off a large number of black police officers it breached its affirmative obligations in violation of the Fourteenth Amendment, fail to return these officers to work? This is one issue presented in this case, and the answer is clearly no.

Opinion

Did the Detroit Police Officers Association fail to take reasonable efforts to protect these black members in connection with the layoffs and thus breach its duty of fair representation to them? This is the second major issue presented here, and the answer is clearly yes.

I

The action was brought by the Detroit Branch of the NAACP, The Guardians, Inc., and ten named individual black police officers against the City of Detroit, its Mayor, its Police Department, its Police Commissioners, its Police Chief, the Detroit Police Officers Association (DPOA), and David Watroba, President of the DPOA. Early in the proceedings, the Court certified a class of all black police officers laid off in 1979 and 1980.[1]

Plaintiffs contend that the City violated affirmative duties imposed by prior findings of constitutional violations in *Baker v. Detroit*, 483 F.Supp. 930 (E.D.Mich.1979), *aff'd sub nom Bratton v. Detroit*, 704 F.2d 878 (6th Cir.), *modified* 712 F.2d 222 (6th Cir.1983), *cert. denied* — U.S. —, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984). Plaintiffs also contend the City defendant violated 42 U.S.C. §§ 1981, 1983, and 1985(3), and that their Thirteenth Amendment rights were denied by the City.

Plaintiffs further claim the DPOA has breached its duty of fair representation under Michigan law, and has violated 42 U.S.C. §§ 1981, 1983 and 1985(3), and the Thirteenth Amendment.

Full trial of the matter began on May 23, 1984, and continued through 21 days and 2,612 pages of transcript.

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[1] The Governor of Michigan and the Michigan Employment Relations Commission were original defendants, but were dismissed on motion early in the case.

Opinion

At issue is the layoff of approximately 1,100 Detroit police officers below the rank of sergeant, approximately 75 percent of whom were black. As a result of a budgetary crisis, the City, in 1979, implemented large-scale layoffs of City employees, including police officers. On October 13, 1979, the City laid off 400 police officers, of whom 71 percent were black, and in 1980 an additional 690 police officers were laid off, 75 percent of whom were black. All officers were laid off pursuant to Article 10(e) of the collective bargaining agreement between the City and the DPOA that required seniority be strictly applied in the event of layoffs, with the result that those last hired were first to be laid off.

In *Baker, supra*, Judge Keith found that the City of Detroit had engaged in intentional racial discrimination in its police department, at least until 1968. *Baker* found, and testimony at trial also revealed, that the City of Detroit did not seriously begin its efforts to eliminate the effects of its past racial discrimination until the 1970's. On July 31, 1974 the City adopted an affirmative action program for its police department, involving hiring and promotions in the Detroit Police Department. This affirmative action program has been upheld by the Sixth Circuit in *Bratton, supra*, and *DPOA v. Young*, 608 F.2d 671 (6th Cir.1979), *cert. denied* 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981).

The affirmative action program resulted in an accelerated hiring rate for blacks in the Detroit Police Department. In 1975, out of 393 appointments to the Detroit Police Department, 250, or 63 percent, were black. In 1976 there were no appointments. In 1977, out of 1,245 appointments, 949, or 76 percent, were black, and in 1978, the last year in which hiring has taken place in the Detroit Police Department, out of 227 appointments, 179, or 78 percent was black.

On December 31, 1978 blacks held 1,719 of 4,393 positions in the rank of police officer, or 39.1 percent, and 1,946 of the total of 5,630 positions in the department, or a total of 34.6

percent. This figure represents the highest percentage of blacks ever in the Detroit Police Department.[2] On February 23, 1984, when this Court issued its partial summary judgment ruling, the Detroit Police Department had a total sworn personnel of 3,762, of which 1,007, or 26 percent, were black. It had a total of 2,668 police officers, of whom 756, or 28 percent, were black. Thus, it is clear that the net effect of the layoffs in 1979 and 1980 was to wipe out most of the affirmative action recruiting that had brought large numbers of blacks onto the police force in 1977 and 1978.[3]

At trial, Dr. Mark Bendick, Jr.,[4] an economist, updated the statistical figures established by Allen Fechter in *Baker*.[5] These statistics, which show the disparity between the number of blacks in the Detroit Police Department and the numbers of blacks in the relevant labor market, can only be explained, according to

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[2] At least since 1966, when the DPOA was made exclusive bargaining representative, all sworn Detroit officers below the rank of sergeant have been members of the DPOA. Thus, statistics for officers below the rank of sergeant kept by the City of Detroit should also be applicable to the DPOA.

[3] On August 12, 1981, the Detroit Police Department recalled 100 officers, and during the period from April 12, 1982 through June 8, 1982 recalled an additional 171 officers. However, further layoffs took place on September 10, 1983, when 224 police officers were laid off. This effectively wiped out most of the recalls of 1981 and 1982.

On June 18, 1984, the Detroit Police Department recalled 135 police officers, of whom 111, or 82.2 percent, were black. Further recalls are anticipated by the Detroit Police Department once the present contract, which is in arbitration under Act 312, is determined.

[4] The Court will adopt Dr. Bendick's method of calculating the shortfall of blacks in the police officer ranks, and in all sworn positions at designated points in time, because his analysis is identical to the method used by Mr. Fechter in *Baker, supra*. It will disregard the testimony of Dr. Joe Darden, who was hired as an expert for the plaintiff, because his method of calculation was not identical to the method used by Fechter.

[5] The figures established by Mr. Fechter can be found at the chart in *Bratton, supra*, p. 894.

both Fechter and Bendick, by racial discrimination in hiring. Bendick, in updating Fechter's work, testified at trial that, if the Detroit Police Department had hired police officers in proportion to the black representation in the relevant labor pool from 1945 to 1978, the black representation at the police officer rank as of December 31, 1978 would have been approximately 47.7 percent, rather than 39.1 percent. His analysis also revealed that, as of April 30, 1980, the black representation at the police officer level would have been approximately 43.8 percent rather than the 28.3 percent. Dr. Bendick made a projection for 1988, and indicated that, if the Detroit Police Department had hired blacks in proportion to their labor market representation in all of the years from 1945 to 1978, the presence of black officers in 1988 would be 50.5 percent. As of 1984, blacks comprised 65 percent of the relevant labor market, and the City of Detroit is 67 percent black.

This description of the effects of racial discrimination on the Detroit Police Department, and the efforts of the City of Detroit to correct its past racial discrimination, cannot be traced without mentioning the police officers' unions. It is a matter of public record that both the Lieutenants and Sergeants Association in *Baker, supra,* and the DPOA in *DPOA v. Young, supra,* brought court challenges to the City's affirmative action plan. The public record, as well as testimony at this trial, indicates that, at least where affirmative action for blacks was concerned, the police unions, including the DPOA, were bitter opponents, of the City. Testimony at trial indicated that the DPOA opposed efforts by the City to hire increased numbers of blacks and opposed the City's residency requirement—that all personnel in the Detroit Police Department have their residency in the City of Detroit, a requirement which, although not directly racial, has clear racial implications given the racial composition of the City of Detroit.

The first collective bargaining agreement between the DPOA and the City of Detroit was entered into in 1967. A seniority clause was bargained in at that time, and this clause has remained in effect in all agreements since. Several contracts

have been entered into since then, but the parties were unable to agree to a contract in 1977, and in 1978 the impasse was referred to arbitration under Public Act 312 of 1969, M.C.L.A § 423.231 et seq.[6] On December 30, 1978, the Act 312 Arbitration Board made its award on economic proposals. This award was challenged by the City in the courts, and was finally affirmed by the Michigan Supreme Court on June 6, 1980. *City of Detroit v. DPOA*, 408 Mich. 410, 294 N.W.2d 68 (1980).

The 1978 Act 312 award plays an important role in the underlying factual scenario of this case. The City of Detroit contended that this award was excessive and was the direct cause of the layoffs. The number of officers laid off was also linked monetarily to the amount of the increased award. The testimony at trial also revealed that the City took a gamble with its court challenges to the award. It did not set aside any monies in its budgets to pay for the award. Thus, when the Michigan Supreme Court, affirmed the award, the City owed a very sizeable lump sum.

From the DPOA's point of view, its attitude during this period was understandably colored by the fact that as of June 1980, when the Michigan Supreme Court rendered its decision, it had still not received the monies due on a 1977 contract, based on a December 1978 award. By 1980, DPOA members were due a considerable sum of retroactive backpay and retroactive COLA.

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[6] Act 312 provides that upon certification that the parties are unable to agree upon all issues in a contract in the public sector, those issues upon which they cannot agree will be submitted to arbitration by an impartial arbitration board, which renders a binding decision. The obvious purpose of this legislation is to avoid strikes in the public sector. The most controversial portion of the Act 312 procedure is its imposition of a mandatory "last-best offer" decision upon the arbitrators. M.C.L.A. § 423.238. The arbitrators have no discretion in this regard and must accept one of the parties "last-best offers." The parties present contract, which expired in 1983, is presently in Act 312 arbitration. The threat of this impending award colors the parties' position to this very day.

II

On February 22, 1984, this Court held that the City of Detroit violated the equal protection clause of the Fourteenth Amendment when it laid off the plaintiff class of black police officers. The court entered a partial summary judgment for plaintiffs, holding:

1. That, based on the findings of intentional discrimination in *Baker v. City of Detroit*, 483 F.Supp. 980 (E.D.Mich.1979), *aff'd sub nom Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir.), *modified* at 712 F.2d 222 (6th Cir.1983), *cert. denied*—U.S.—, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984), the City had a constitutionally imposed continuing affirmative obligation not only to stop the discrimination but to remedy all of the effects of the discrimination.

2. That the City had not yet remedied the effects of this prior discrimination when, in 1979 and 1980, it reduced black representation on the police force.

3. That by these layoffs, which the City knew full well would reduce black representation on the police force, the City breached its affirmative obligation to the plaintiffs in violation of their rights under the Fourteenth Amendment.

This ruling was predicated upon the findings of intentional past discrimination against blacks in the Detroit Police Department made by Judge Keith in *Baker, supra*. In *NAACP v. Detroit Police Officers Association*, 525 F.Supp. 1215 (E.D.Mich. 1981), this Court previously held in this case that the doctrine of collateral estoppel precluded relitigation of the issue of the City's past intentional discrimination, as found in *Baker*.

Bratton and *Baker* found that, at least until 1968, the City of Detroit "employed a consistent overt policy of intentional discrimination against blacks in all phases of its operations." *Bratton, supra*, at 888. Since the *Baker—Bratton* decisions were in the context of suits by white officers challenging the City's

voluntary affirmative action plan, neither Judge Keith nor the Sixth Circuit had to reach the obvious corollary of these findings—that this consistent policy of intentional discrimination was in violation of the Fourteenth Amendment, which prohibits all invidious racial discrimination, *See Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed2d 1010 (1967). The record in *Baker* is "replete with evidence", *Bratton, supra*, at 888, of invidious racial discrimination against blacks in the Detroit Police Department prior to 1968.

In 1967, at a time when the City of Detroit was 40 percent black, the Detroit Police Department was only 6 percent black. Prior to that time, the Detroit Police Department had been a segregated department where blacks were assigned to patrol exclusively black areas, scout cars were segregated, and nearly every phase of the operation of the Police Department, from patrols to investigations to supervisory functions, was segregated. Perhaps even worse than the discrimination against blacks in the Detroit Police Department itself was the effect of this discrimination upon relations between the police and the black community. This relationship has been characterized by all observers as one of deep hostility, and the race riots that occurred in this City in 1943 and 1967 have been directly tied to the hostility between the police and the community, a direct result of invidious racial discrimination in the Detroit Police Department.

Testimony introduced at trial in this case also confirmed the history of intentional race discrimination against blacks. Chief William Hart, who is black and who joined the Department in 1952 and eventually rose through the ranks to become Chief in 1976, testified about this past discrimination, as did Executive Deputy Chief James Bannon, who is white and who joined the Department in 1949.

Furthermore, Dr. Mark Bendick, Jr., the economist who updated the *Fechter* analysis from *Baker*, also testified that the statistical shortfalls of blacks in the Detroit Police Department

over the years, up to the early '70s, could only be explained as the result of racial discrimination.

In *DPOA v. Young, supra,* a case in which white patrolmen and the DPOA challenged the City of Detroit's voluntary affirmative action plan mandating a 50/50 black-white ratio in promotions of patrolmen to sergeants the court delineated the constitutional obligation here. "[T]he Constitution imposes on states a duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination." *Id.* at 691. In addition to the foregoing holding, the court held that "[I]t was error to require proof that the persons receiving the preferential treatment had been individually subjected to discrimination, for 'it is enough that each recipient is within a general class of persons likely to have been victims of discrimination.' " *Id.* at 694.

Based on these judicial findings of past discrimination it is clear the City had an affirmative obligation to eliminate the continuing effects of past racial discrimination, and to eliminate all racial discrimination "root and branch." *Green v. County School Board,* 391 U.S. 430, 438, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1967). *See also Swann v. Charlotte-Mecklenburg,* 402 U.S. 1, 15, 91 S.Ct. 1267, 1275, 28 L.Ed.2d 554 (1971); *Keyes v. School District No. 1,* 413 U.S. 189, 200 n. 11, 93 S.Ct. 2686, 2693 n. 11, 37 L.Ed.2d 548 (1973). The City had notice of all of these judicial findings as of October 1, 1979 when Judge Keith's opinion in *Baker* was issued.

[1] Thus, in 1979, when the first of the massive layoffs of black officers involved in this case took place, the constitutional obligation of the City to eliminate continuing effects of past racial discrimination continued to exist. Although the City, through its voluntary affirmative action plan, had made great strides towards satisfying its constitutional remedial obligation prior to 1979, the obligation nonetheless remained in force in 1979. Although in 1978, the year before the layoffs involved in this case took place, 39 percent of Detroit police officers were black, the highest percentage ever, blacks still were 62.2 percent

of the relevant labor market. The 1978 figure of 39 percent blacks still represented a 6.6 percent shortfall of what the percentage of blacks would have been absent racial discrimination, according to testimony of Dr. Bendick. Given the percentage of blacks in the Detroit labor market in 1978, this figure is a conservative one in terms of what percentage would have been constitutionally mandated. *See Bratton,* as modified on rehearing, 712 F.2d 222, 223 (6th Cir.1983).

It is clear that the layoffs in 1979 and 1980 had a devastating effect upon the City's affirmative action plan. The present percentage of black representation in the ranks of police officers is 28.3 percent, and in all ranks 27.9 percent. The relevant labor market in the City of Detroit today is well over 65 percent.

The City thus breached its affirmative constitutionally mandated duty to remedy past intentional racial discrimination in the Police Department when it began its massive layoffs of black officers in 1979 and 1980, and this breach was knowing and intentional. "If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make these actions any less 'intentional.' " *Keyes, supra* 413 U.S. at p. 210-211, 93 S.Ct. at p. 2698-2699.

[2] The September 3 letter of Mayor Young to David Watroba, plaintiff's Exhibit 1, shows that the City knew that it was under a legal mandate to continue its affirmative obligation to plaintiffs, and knew that the layoffs would have a drastic effect upon this obligation. Mayor Young wrote:

> In closing, let me remind you that affirmative action as a concept is not negotiable. It is mandated not only by the City Charter, but also by state and federal law and the Courts as well.
>
> It is also my opinion that the duty to implement affirmative action does not stop just because we have found more

equitable ways to hire new police officers. Rather, we have a double duty—and we are now challenged to find equitable ways to implement the September 5 layoffs.

The fact that we have found ways to remove hiring barriers at the front door does not relieve us to of our obligation to find ways to remove comparable barriers at the back door, now that the circumstances require it.

[3-6] The City argues that the law at the time was unclear on this subject, especially in relationship to the City's contractual obligation to the DPOA with reference to seniority rights. It is well established that good faith is not a defense by a municipality to a constitutional violation. *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). Further, the Fourteenth Amendment provides no mention of bona fide seniority clauses nor contractual obligations as a defense. Nor can state laws stand in the way of full and complete remedies for constitutional violations. *Milliken v. Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974). *See also Bakke*, 438 U.S. 265, at 307, 98 S.Ct. 2733 at 2757, 57 L.Ed.2d 750, (race-conscious action to remedy past discrimination is permissible, if based upon prior judicial, legislative or administrative findings of constitutional statutory violations.) (Powell, J.). Nor can parties by contract limit their liability for pre-existing constitutional violations.[7] This law was clearly established at the time the City began its unconstitutional course of action in laying off massive numbers of black police officers.

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[7] The City argues that in 1979 it was subject to conflicting legal obligations—its constitutional ones towards black officers and contractual obligations towards white officers. The City never sought declaratory relief from this or any other court. It cites no authority, nor could it, for the proposition that constitutional remedies can be frustrated by contractual obligations. Its citation of *W.R. Grace v. Local 759*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), for the proposition that it would have been subject to double liability to white officers had it taken steps to protect black officers is inapposite. *W.R. Grace* involved a conciliation agreement under Title VII, with no constitutional issues involved, nor previous judicial findings of past racial discrimination.

[7] In its motion for reconsideration of this Court's order of partial summary judgement, the City objects to the finding of intentional discrimination at the time the City began its layoffs in 1979, and attempts to attach particular significance to general definitions of intent in the racial discrimination field, which hold that foreseeable results and discriminatory impact, *without more*, do not establish discriminatory purpose. *See e.g. Columbus Board of Education v. Penick*, 443 U.S. 449, 464, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1975), *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979). This is not the situation here. Here we have the "more"—the judicial findings of past intentional discrimination made by Judge Keith in *Baker*, and affirmed by the Sixth Circuit in *Bratton*.

Given this past finding of intentional discrimination, the City becomes liable every time it knowingly and foreseeably breaches its affirmative obligations to remedy this discrimination. The remoteness in time from the original act of intentional discrimination does not make later acts any less intentional. *Keyes, supra.* "Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Board of Education v. Penick, supra* 443 U.S. at 459, 99 S.Ct. at 2947. Thus, the City's discussion of the particular intent of the City in 1979-80 is largely irrelevant. "[T]he measure of the post *Brown* I conduct of the school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." (Citations omitted). *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 538, 99 S.Ct. 2971, 2979, 61 L.Ed.2d 720 (1979).

This court does not ascribe racially discriminatory animus to Mayor Young and his administration. It is obvious that he has led the attempts of the City to remedy past discrimination against blacks in the Police Department, attempts which have placed the City of Detroit in the forefront of major metropolitan areas in this regard.

However, it is equally obvious from the testimony and exhibits that in 1979, and more particularly in 1980, the City made a politically expedient decision that it would rather face a lawsuit by black police officers than face a lawsuit by white police officers.[8] It also decided it would threaten layoffs of black officers as a club against the DPOA in an attempt to roll back the 1978 Act 312 arbitration award, especially the retroactive pay and COLA increases ordered in that award.

It is not the function of this Court to inquire into the political wisdom of these decisions. However, the Constitution, and particularly the Fourteenth Amendment, exists precisely to insure that the individual and group rights of all citizens, especially minorities who have been historically shut out of the political process, are protected in the political process.

[8] The rights of the black police officers and black citizens of Detroit to a fully integrated police force were sacrificed in the 1979 and 1980 layoffs. A city does not fulfill its obligations under the Fourteenth Amendment, nor does a union fulfill its obligations to fairly represent its members, by simply giving the difficult problem of redressing racial injustice in our society to the federal courts.

During the trial of this case, the United States Supreme Court issued its opinion in *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984). This case has initiated a far-reaching debate over its implications for affirmative action and civil rights in general, but this Court need not address this debate since *Stotts* is not controlling here.

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[8] This, the City concedes: "... they (the city defendants) clearly would have preferred to depart from seniority based layoffs, yet chose not to because they believed that a court would be more likely to award back pay to prevailing white plaintiffs than it would to prevailing black plaintiffs."

Brief of City of Detroit on City's motion for Partial Summary Judgment, page 2.

Stotts involved Title VII.[9] This case involves liability under the Fourteenth Amendment. Title VII contains a clause specifically exempting bona fide seniority systems from attack.[10] The Fourteenth Amendment contains no such restrictions. *Stotts* and the Title VII cases relied upon by the Supreme Court there rest on interpretations of Congressional intent in enacting Title VII, and contain no interpretation of the Fourteenth Amendment.

In addition, *Stotts* involved a consent decree that specifically disclaimed liability for past discrimination. This case involves prior judicial determinations of past intentional discrimination.

The majority opinion in *Stotts* itself indicates it is distinguishable from a case where there has been a finding of past intentional discrimination: "Neither does it suffice to rely on the District Court's remedial authority under Sections 1981 and 1983. Under these sections, relief is authorized only when there is proof or admission of intentional discrimination .... Neither precondition was satisfied here." *Id.* —U.S. at —— n. 16, 104 S.Ct. at 2590 n. 16.[11]

This view of *Stotts* is confirmed by the recent denial of certiorari in *Buffalo Teachers Federation v. Arthur, cert. denied* — U.S. —, 104 S.Ct. 3555, 82 L.Ed.2d 856 (1984). The Second Circuit's opinion below in *Arthur v. Nyquist*, 712 F.2d 816 (2d

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[9] 42 U.S.C. § 2000e et seq.

[10] Sec. 703(h) of Title VII, 42 U.S.C. § 2000e-2(h).

[11] The Court does not accept the City's position advanced in post-trial argument that Title VII law regarding bona fide seniority systems is controlling in constitutional litigation. The cases cited by the City, *Chance v. Board of Education*, 534 F.2d 993 (2d Cir.1976); *Schaefer v. Tannian*, 538 F.2d 1234 (6th Cir.1976); *Stokes v. New York St. Dept. of Correctional Servs.* 369 F.Supp. 918 (S.D.N.Y.1982); and *General Building Contractors Assoc., Inc. v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982) simply do not stand for this proposition, and until the U.S. Supreme Court declares otherwise, this Court will not write "bona fide seniority system" into the U.S. Constitution, as the City invites it to do.

Cir.1983), involved the affirmance of a district court order that overrode the seniority system involving teachers in the Buffalo Public School System. This order was based on prior findings of intentional discrimination by the Buffalo school system, including the hiring of teachers.

The Second Circuit specifically held that the Title VII cases, which were the basis for the holding in *Stotts*, particularly *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), which protect bona fide seniority systems, are not applicable in cases seeking remedies for constitutional violations based on judicial findings of intentional racial discrimination:

> Nor was the District Court's authority impaired, as the Federation contends, by the Supreme Court's decisions in *American Tobacco Co. v. Patterson*, 456 U.S. 63 [102 S.Ct. 1534, 71 L.Ed.2d 748] (1982), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 [97 S.Ct. 1843, 52 L.Ed.2d 396] (1977). In those Title VII cases, the Supreme Court ruled that bona fide seniority systems must be honored, unless there has been a finding of actual intent to discriminate . . . Here, however, the suit was brought to remedy violations of the Constitution rather than Title VII, and the District Court made a finding of intentional discrimination in the Board's maintenance of a segregated school system. We therefore agree with the District Court that it had the authority to curtail the seniority rights of the Federation's membership in order to vindicate the constitutional rights of the minority children in the Buffalo school system . . . . Once a local board of education has been found to have employed staff hiring practices that contribute to a racially segregated school system, the District Court has the power to remedy those practices and to override seniority systems that perpetuate those practices.

Id. at 822.[12] *See also Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir.1983), which reaffirmed this general principle, but held that the court-ordered remedy in the particular case was improper.

In general, no precedential effect should be given to a denial of certiorari. However, this Court can only conclude that, in light of footnote 16 in *Stotts, supra*, and the denial of certiorari in *Arthur* only two weeks after *Stotts*, *Stotts* presents no authority for changing this Court's determination of liability against the City of Detroit.

Therefore, this court reaffirms its determination that the City breached its affirmative obligations to the plaintiffs in violation of their Fourteenth Amendment rights.[13]

III

"[T]he nature of the violation determines the scope of the remedy." *Milliken v. Bradley*, 418 U.S. 717, 738, 94 S.Ct. 3112, 3124, 41 L.Ed.2d 1069 (1974), (Milliken I); *Hills v. Gautreaux*, 425 U.S. 284, 293-94, 96 S.Ct. 1538, 1544-45, 47 L.Ed.2d 792 (1974). Having established the liability of the City under the Fourteenth Amendment, it now becomes necessary to delineate

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[12] The City's attempt to distinguish this case, as well as a similar case, *Morgan v. O'Bryant*, 671 F.2d 23 (lst Cir.1982), *cert. denied*, 459 U.S. 827, 103 S.Ct. 62, 74 L.Ed.2d 64, on the grounds they involved the vindication of the rights of students, not teachers, is not persuasive. Both cases involved findings of past intentional discrimination in hiring, as does this case. It is hard to fathom how the City can read these cases to stand for the proposition that it owes no constitutional duty to its black police officers. They stand for precisely the contrary.

[13] In addition to its Fourteenth Amendment claim, plaintiffs assert claims under the Thirteenth Amendment, 42 U.S.C. §§ 1981 and 1985(3). Given this Court's holding regarding the Fourteenth Amendment liability of the City, it is unnecessary to reach the Thirteenth Amendment and § 1981 claims. There has been no showing sufficient to sustain a finding of conspiracy liability under 42 U.S.C. § 1985(3). The evidence shows that the City and the DPOA have agreed upon virtually nothing since 1966.

the nature of the wrong, and the relief to be ordered against the City.

For the class of laid-off black officers there is obviously the loss of their jobs, which resulted from these unconstitutional acts, as well as the loss of back pay and other fringe benefits. William Bracey, former Chief of Patrol of the New York City Police Department, a very informative and credible witness, who, in 36 years, rose from the ranks of patrolman to become the highest ranking black officer in the New York Police Department, testified dramatically to this point.

He described the traumatic effect of layoffs on newly-hired black officers, stressing that when black officers are laid off after only serving briefly they have an added burden that white officers do not have. Because of the past racial animosity to the police, they often are alienated from friends and families, and are likely to have less support from them when they are laid off after just recently being hired. Often all of the distrust engendered by years of segregation surfaces again, and the officer, his friends and family think, "They're playing games with you. They really didn't want you in the first place."

Chief Bracey testified that this trauma is even more acute for rookie officers, and that the normal adjustment to becoming a police officer is difficult enough without the newly-hired black officer having the additional trauma of getting a message from the City that it is not serious about remedying the past discrimination in the Department.

[9] Thus, based on this testimony, the Court finds that in addition to the usual losses sustained with the loss of employment, the class of black officers suffered injury as a direct result of the City's past racial discrimination, and its failure in 1979 and 1980 to continue to remedy this discrimination. To put it bluntly—they suffered the trauma of betrayal. After placing their standing in the community in jeopardy by joining the police force, they had to now face the inference that the City was "playing games" with them, and was not serious about its efforts

to remedy this past discrimination. This trauma was directly tied to the City's constitutional violation.

[10] Without minimizing the losses suffered by the black officers, testimony at trial revealed a constitutional violation of even greater magnitude—the harm to the black citizens of the City of Detroit. Perhaps even more than the individual officers, they are the victims in this case.

When we deal with the police in an employment situation, we are not dealing with a private employer. The police function "fulfills a most fundamental obligation of government to its constituency," *Foley v. Connelie*, 435 U.S. 291, 297, 98 S.Ct. 1067, 1071, 55 L.Ed.2d 287 (1978). *Baker*, *Bratton*, and *DPOA v. Young* have affirmatively recognized what is known as the "operational needs" defense for affirmative action in the Detroit Police Department—that the presence of black officers on the police force is vital in enabling the police to effectively fulfill its police function. *See also Van Aken v. Young*, 541 F.Supp. 448 (E.D. Mich.1982).

In *DPOA v. Young*, *supra*, the Court held:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception on law enforcement officials and institutions.

608 F.2d at 696.

Baker and *DPOA v. Young* developed the operational needs theory in terms of legal justification for affirmative action. The testimony in this trial persuasively developed the converse—the harm to the black citizens in Detroit when the City retreated

from its commitment to affirmative action and a police force that met the needs of its community.

The testimony of Chief Bracey, Patrick Murphy, former Detroit and New York City Police Commissioner and currently president of the Police Foundation, Chief Hart, Deputy Chief Bannon, and Mayor Young developed the operational needs concept. Former Commissioner Murphy testified that the presence of black officers is vital to the whole concept of democratic policing, and that police should come from the people they serve. He emphasized the way black officers can educate white officers on the mores, folkways and language of the black community. He stated that it is absolutely necessary that the community be involved in policing, and to accomplish that, police officers must be representative of the community. He testified that there has been great improvement in police-community relations over the last 15 years, and that this has been largely due to the existence of more minorities on police forces. This evidence is overwhelming, and largely unrebutted. No one today could seriously hold the DPOA's position that a white police force living in the suburbs could effectively police the City of Detroit.

Mayor Coleman Young pointed out that formerly there was great alienation between the black community and the police department which resulted in ineffective law enforcement and poor community relations. This was changed in recent years. The Mayor also pointed out that the DPOA has exerted great influence in past administrations, and has regularly resisted efforts to hire more blacks. He testified that no officer of the DPOA has ever protested racial discrimination in the Detroit Police Department, or complained to him on behalf of any of its black members.

Chief Hart and Deputy Chief Bannon also testified forcefully on this subject. They said that, prior to 1974 when the City first seriously began to eliminate racial segregation in the Detroit Police Department, the Department was viewed as an occupation army by the black citizens of Detroit. This, they said, reduced

the effectiveness of the police in that they could not get witnesses to testify or cooperate in solving crimes, controlling crowds, or in crime prevention.

Both testified concerning changes that have taken place since citizens began to see that the City was serious about making the police more representative of the citizenry. There is a greater degree of police-citizen cooperation, crowd control is more easily handled, and crime prevention projects have increased dramatically. Furthermore, police fatalities have been drastically reduced. All of this is tied to the presence of sufficient numbers of blacks on the Detroit Police Department.

Chief William Hart has been chief since 1976. He has a doctorate from Wayne State University, and is a career police officer, having entered the Detroit Police Force in 1952.

Chief Hart outlined the history and background of the relationship between the police and the community in the 1950s and the 1960s, pointing out that at that time relations were very bad, and that the police, predominately white, was considered an army of occupation. He testified that when he first went on the force only three precincts had black officers, and that the department was totally segregated. Poignantly, he testified that he could not be assigned to a clean-up squad (a local vice squad in the precinct) until he could find a sergeant who would have a black on his team.

Chief Hart testified that the lack of trust in the police department prior to the '70s made it very difficult to properly police the City. He testified that after 1974 police-community relations changed dramatically, and he says now the people in the neighborhoods are part of the solution rather than part of the problem. Violence has been greatly reduced against police officers because of integration, and the rate of police killings has been greatly reduced. Police brutality against citizens has been greatly reduced and is almost nil at the present time.

Finally, Chief Hart pointed out that, with the layoff of the large numbers of black officers, the forward strides have been put on hold. The layoff of blacks has hampered the ability to fight narcotics, to do undercover work, to do surveillance work, and to work with organized crime and vice. Although there is a residue of good will in the community resulting from the increased black representation on the force, such good will cannot last forever. He wants all of the officers, black and white, called back.

Executive Deputy Chief James Bannon, of the Detroit Police Department, is a white, career police officer, who has been on the force since 1949. He holds a Ph.D. degree. He also testified that there is presently mutual support between the community and the Police Department, and reiterated Chief Hart's testimony that formerly the Police Department was an occupation force in the black community. The changes in attitude that have come about as the result of the number of blacks coming onto the force has been dramatic. Several factors brought about this change in the community and in the force, according to Chief Bannon:

1. A black Mayor and a black Police Chief have given people a feeling of accessibility;

2. Blacks are in policy positions in the Department for the first time;

3. The high visibility of black officers in the community has been significant in changing the community's attitudes.

The testimony of all police officials was that, as the result of the increase in black representation on the police force, the community relations with the police force had dramatically improved since 1974, and there has been a complete reversal in community attitude towards the force. They all testified, however, that the good will developed by the Detroit Police Department since 1974 is not inexhaustable, and can be used up if the community begins to see the return to the past days of racial segregation in the Detroit Police Department. Although the presence of many black command officers, who were unaffected

by the layoffs, somewhat ameliorates this problem, it is undisputed that black patrol officers are the most visible, have the most daily contacts with the community, and are most important in crime prevention and community relations. Therefore, massive reductions in the numbers of black police officers below the rank of sergeant on the street will have dramatic effects.

Just as significant as the testimony were the exhibits showing the effect of these layoffs on the actual operations of the Detroit Police Department. A particularly significant exhibit was Exhibit 645, which shows the racial composition of the Detroit Police Department by sections and precincts. The Special Events Unit, a highly visible unit charged with crowd control during major events, has been reduced from 28 percent black prior to the 1979 layoffs to presently six percent black. Precinct No. 5, which in September 1977 had a population that was 63.1 percent black, today has 18 percent blacks on patrol. Precinct No. 15, a predominently white precinct, which, prior to the layoffs, had 33 percent blacks on patrol, today has four percent blacks. Only six black officers, divided among three shifts, are now assigned to this precinct. This statistic parallels the worst days of segregation in the police department.

Finally, Exhibit 645 shows that the Youth Bureau, in a city where 80 percent of the youth is black, is only 13 percent black. Given the importance of black officers as role models for the youth and the importance of preventing youth crime, this statistic is a striking demonstration of the effect of this constitutional violation.

Thus, the City is in real danger of seeing the gains of the 1970's in terms of police-community cooperation reversed, if the City's unconstitutional layoffs are not remedied.

It is clear from the testimony of Mayor Young and the police experts, Bracey, Hart, Bannon, Murphy, and the exhibits, that the return of black officers to the streets of the City of Detroit is not only necessary to vindicate the constitutional rights of the black police officers, but is also an absolute necessity to restore

balance to the community, and the confidence of the community in the Detroit Police Department. Their testimony was intelligent, credible and convincing, and clearly established the need for the return to the force of the black police officers.

Thus, there are two constitutional violations which must be remedied—the harm resulting from the City's abandonment of its black officers, and the harm to the black community if the police force is returned to the days of racial segregation.

[11, 12] It is well established by now that race-conscious remedies are permitted to redress constitutional violations, *Bakke, supra*, 438 U.S. at 307, 98 S.Ct at 2757; *Bratton, supra*, at 882; *DPOA v. Young, supra*, and *Oliver v. Kalamazoo, supra*. Class-wide relief to remedy past constitutional violations is equally permissible without the individual members of the class having to prove that they were actual victims of past discrimination. "[I]t was error to require proof that the persons receiving the preferential treatment had been individually subjected to discrimination, for 'it is enough that each recipient is within a general class of persons likely to have been victims of discrimination.' " *DPOA v. Young, supra*, at 694, citing *Bakke*.[14]

[13] Although race-conscious remedial relief is permissible, the remedy must be "necessary" and "tailored" to cure the constitutional violations. *Oliver, supra*, at 764. A similar standard was established by Justice Powell in *Bakke:* "When they [classifications] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Bakke, supra*, 438 U.S. at 299, 98 S.Ct. at 2753. And it is clear that this Court is mandated to "balance individual and collective interests." *Swann v. Charlotte-Mecklenburg, supra* 402 U.S. at 16, 91 S.Ct. at 1276.

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[14] For the reasons set forth, *supra*, pp. 1202-1204, *Storts* does not affect this holding of the Sixth Circuit.

Opinion

Based upon the findings of liability and the findings of the nature of the constitutional violation, this Court will order the following relief to cure the constitutional violation:

[14] The first relief to be ordered is the reinstatement of all black officers laid off in 1979 and 1980 who currently remain on layoff status, and who wish to return.[15] This should be done in an orderly manner and over a period of time, so that the City will have an opportunity to make the budget adjustments necessary to effectuate the return of these officers.

Therefore, the Court will order that all these officers be called back within 180 days of this opinion. Seniority will control in determining the order of callback. Within 30 days of the date of this opinion, the City shall present to the Court a plan to accomplish this.

All callbacks will be subject to the normal procedures of the Police Department—that is, the Department must determine if each officer desiring to return to duty is still qualified to be a Detroit police officer. If he or she is not, but can become qualified through additional training, such training shall be provided. In short, the Department may be subject officers desiring to return to duty to the normal procedures employed by them for all returning laid-off police officers.

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[15] As discussed earlier, this Court rejects the City's argument that the distinctions made in *Arthur v. Nyquist, supra*, and *Morgan v. O'Bryant, supra*, between harm to the public and harm to individual employees, prevent this Court from ordering the recall of the plaintiff officers. The constitutional mandate of this Court is that the remedy must be related to the "*condition* alleged to offend the Constitution . . . ." *Milliken v. Bradley*, 433 U.S. 267 at 280, 97 S.Ct. 2749 at 2757, 53 L.Ed.2d 745. This is what the recall of these officers is designed to do. The City argues against the recall of the officers, and yet asks this Court to order affirmative action recalls and layoffs at will of the City, intervention in the City-DPOA Act 312 proceedings, and a wage freeze (City Trial Brief, p. 49). This argument is self-serving and based on *Byzantine* legal distinctions which this Court rejects.

Moreover, all officers returned under this order shall be awarded the seniority he or she would have had, if there had been no layoffs.

[15] In addition, the Court permanently enjoins the City from laying off, suspending, or discharging, except for disciplinary reasons, any black police officer without the prior approval of this Court. This remedy is necessary to vindicate the needs of the individual black officers and the compelling state interest in a police force reflective of this community.

Similarly, the Court permanently enjoins the City from laying off, suspending or discharging, except for disciplinary reasons, any white police officer, without the prior approval of this Court. It is possible that one of the solutions the City will seek to the remedy in this case will be to attempt to layoff white officers with higher seniority than blacks. This the Court, at the present time, will not allow. The case law—***Bakke, Oliver, Arthur***—demands that the Court take into consideration the interests of white officers with higher seniority than blacks.

The financial information furnished to the Court, which perhaps could be relevant to this issue, was less than satisfactory. Although it was represented that the Budget Director of the City of Detroit would be produced as a witness, the City failed to produce him, and in his stead produced a budget analyst, Edward Rego, whose testimony was vague and imprecise upon budget figures.

Mr. Rego, while admitting that the budget of the City is merely a financial manifestation of a series of political choices, was unable to explain items amounting to some $300,000,000, nearly 20 percent of the 1.5 billion budget for 1984-1985. He made much of the claim that certain budget items are restricted by state or federal law, but the record, insofar as it was made, established that only 39 percent of City employees are on jobs which are funded from either revenue sharing or other grant monies from the federal or state governments.

Opinion

While the Police Department budget was less than 26 percent of the City's non-restricted budget, the Police Department's share of budget reduction effort in 1979, 1980, and 1983 was more than 50 percent of the total. This is so even though the cost of a police officer (salary plus fringes) proved to be ony $44,560, rather than the $50,000 per year earlier used by the City.

Next, the Court must concern itself with the rights of laid-off white officers who may be senior to black officers being called back under this order. Their interests must be taken into account in fashioning any final remedy. This is mandated by *Bakke*, *DPOA v. Young*, *Oliver v. Kalamazoo*, and *Arthur v. Nyquist*. But in every one of those cases, the white officers or teachers were actively present in the lawsuit and presented their interests. This did not happen here. Although the DPOA protested that it did represent the white officers, this Court has found that they did not, and that the white officers had not adequate representation in this case.[16] There is not showing on this record of the numbers or the interest of these officers, and the Court has nothing other than speculation upon which to make a determination of their interests.

This Court will therefore allow 30 days for any laid-off white officer, with greater seniority than any laid-off black officer called back, to intervene in this lawsuit for a determination of his or her interest. The Court expresses no opinion as to these interests, if any, nor does the Court express any opinion as to whether doctrines of estoppel, latches, etc. would bar the Court from considering their claims. The Court simply believes that, given the record introduced by the DPOA in this case, and contrary to their representations that they represented the laid-off white officers, equity requires that any white officer who desires be heard. It will be the responsibility of the City of Detroit to notify all laid-off white officers of this determination.

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[16] See colloquy between the Court and counsel, Transcript of Testimony, Volume 14, June 13, 1984, pp. 1649-53.

The next request for relief is the ordering of back pay. This Court will not order back pay relief against either the City or the DPOA. Even in Title VII cases, where back pay is generally presumed, the Court still retains equitable discretion and can deny it for equitable reasons. *See City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 722-23, 98 S.Ct. 1370, 1382-83, 55 L.Ed.2d 657 (1978). But this is not a Title VII case. Here the Court has even greater equitable discretion under a constitutional analysis, especially in light of judicial mandates that constitutional remedies be tailored to the scope of the constitutional violation. *Milliken, supra, Oliver v. Kalamazoo, supra.* The Court must necessarily balance the individual and collective interests involved.

Although this Court has already held that class-wide remedial relief is not limited to individual victims of prior discrimination, and has ordered such remedial relief, and although this Court does not believe that any legal authority bars back pay in a situation such as is presented here, the Court must take into account the fact that no evidence has been presented that any individual member of the plaintiff class was an actual victim of racial discrimination in hiring. This is an equitable factor that must be weighed in balancing individual and collective interests and tailoring the scope of the remedy.

The wrong in this case was not only that of individual discrimination. It was also a collective wrong, a wrong to the expectations of the citizenry and the black police of the City of Detroit, who expected the City to be serious about its commitment to affirmative action, which would result in a police force reflective of the community. The collective interests outweigh the admittedly important private interest in back pay in this case, and merit denial of back pay.

Regardless of the amount of any back pay award,[17] it would certainly be substantial. These costs would be borne primarily by

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[17] If back pay were ordered, Chief Hart said it would ruin the City. Dr. Sidney Mitre, Professor of Economics at Oakland University, testified that the total wage loss suffered by all officers as a result of the layoffs was $50,734,700, the total pension loss was $32,321,667, and the fringe benefit loss $5,386,940, for a total of more than $86,000,000.

the black citizenry of Detroit. While financial inability to pay is no defense to a constitutional remedy, financial factors certainly must enter into the equitable balancing this Court must undertake. The relief the Court has ordered will sufficiently make the plaintiffs whole, and is tailored to the constitutional violation. In view of the fact that the violation here was to the collective interests of the laid-off officers and the citizens of Detroit, this Court believes justice will not be served by a massive back pay award, and therefore back pay will be denied.

IV

The DPOA, which was established in 1943, was formally certified to serve as the collective bargaining agent for all Detroit police officers below the rank of sergeant in 1966. It was granted its authority by the Public Employee Relations Act of 1965, M.C.L.A. § 423.211, which provides in pertinent part;

> Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment . . .

[16, 17] As the exclusive bargaining representative for its members, the DPOA has a duty of fair representation under Michigan law. *Lowe v. Hotel & Restaurant Employees Union, Local 705*, 389 Mich. 123, 205 N.W.2d 167 (1973). Plaintiffs claim that the DPOA breached this duty, which is a pendent one brought under Michigan law. According to Michigan law, the Court must look to federal law for guidance in deciding the fair representation issue, since the full development of this doctrine has taken place through judicial interpretation of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq. *See Bebensee v. Ross Pierce*, 400 Mich. 233, 253 N.W.2d 633 (1977).

[18, 19] The duty of fair representation is a judicially created remedy. There is no specific reference to it in either the NLRA or in Michigan statutory law. Instead, the doctrine has been developed by the judiciary as a necessary, and, in the case of racial discrimination, a constitutionally imposed duty arising from the grant of authority by legislatures to unions to be the exclusive representatives of their members. By allowing unions to be exclusive representatives of their members, and thus subsuming rights of minorities in collective bargaining, unions have not been granted licenses to practice racial discrimination in violation of either the Fourteenth Amendment or the equal protection clause of the Michigan Constitution. Mich. Const. Art. 1, § 2.

Since this case involves claims of racial discrimination by an exclusive bargaining representative (the DPOA), the Court must be especially sensitive to the fact that the duty of fair representation arose as a doctrine to protect minorities, and blacks in particular, from racial discrimination by unions. When the NLRB was originally established, leaders of black organizations expressed fears that by granting exclusive representative status to certain unions, racially discriminatory policies by unions would have the authority of a law.

Congress attempted to allay these fears in the debate surrounding the NLRA, and the United States Supreme Court firmly outlawed racial discrimination by unions by establishing the duty of fair representation in *Steele v. Louisville & Nashville Railroad Co.*, 823 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 178 (1944). The Court held there that the duty of fair representation required the union to represent minority union members without hostile discrimination, fairly, impartially, and in good faith:

> So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of

> the craft. While the status does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, . . . to represent nonunion and minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. . . .

Id. at 204, 65 S.Ct. at 232.

[20] It is clear that the exclusivity principle of the NLRA and M.C.L.A. § 423.211 is constitutional only if there is a duty of fair representation, and that means representation of all members of the union. The duty of fair representation is a fundamental limitation upon union activity. *Humphrey v. Moore*, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964).

Without the judicially imposed duty of fair representation, the tradeoffs made by minorities in allowing unions to be their exclusive representatives in order to protect majority interest and to achieve industrial peace through the encouragement of voluntary agreements, the purposes of the NLRA would be hollow. In return for exclusive bargaining, blacks in the DPOA are prohibited from bargaining directly with the City of Detroit, and are prohibited from taking any direct action against the City of Detroit independently of the DPOA. *See Emporium Capwell Company v. Western Addition Community Organization*, 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975). The DPOA is the only spokesperson for black police officers to the employer, and thus has tremendous power over the welfare of black employees. The judiciary has a duty to see that this power is not abused, and does not become a grant of authority to practice racial discrimination.

Michigan has recognized the duty of fair representation as a matter of state law:

> In many ways, the relationship between a union and its members is a fiduciary one. Certainly it is a relationship of fidelity, of faith, of trust, and of confidence.

Lowe, 389 Mich. at 145, 205 N.W.2d 167.

And,

> [T]he union must act without fraud, bad faith, hostility, discrimination, arbitrariness, caprice, gross nonfeasance, collusion, bias, prejudice, wilfull, wanton, wrongful and malicious refusal, personal spite, ill will, bad feelings, improper motives, misconduct, overreaching, unreasonable action, or gross abuse of its discretion. . . .

Id. at 146-47, 205 N.W.2d 167.

There is no reason to believe that Michigan would interpret this duty more narrowly than the U.S. Supreme Court. The state has a historical commitment to the abolition of racial discrimination, and has been a leader in breaking down the barriers between races. In fact, to the extent that Michigan case law has evinced a standard different from the federal standard, it appears to be even more strict than the federal standard. "When the general good conflicts with the legal or civil rights of an individual member, the courts will recognize and enforce them as against the will of the majority union membership." *Lowe*, 389 Mich. at 146, 205 N.W.2d 167.

As a judicial remedy, the legal standard for finding a breach of the duty of fair representation must be somewhat open ended and flexible, given different factual circumstances. As Judge McCree pointed out in *St. Clair v. Local No. 15 of International Brotherhood of Teamsters*, 422 F.2d 128, 130 (6th Cir.1969): "The phrase 'fair representation' is something of a term of art, and the standards by which we are bound have not been set down explicitly in a code."

Thus, "fairness" is the standard for the duty of fair representation. The duty requires rational decision-making and procedural protection to protect minority members from discriminatory treatment. It has been said that the duty of fair representation creates a duty of "fair dealing." *International Union of Electrical Workers v. NLRB*, 307 F.2d 679, 683

(D.C.Cir.1961), *cert. denied* 371 U.S. 936, 83 S.Ct. 307, 9 L.Ed.2d 270 (1962).

The duty of fair representation was defined by the United States Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967):

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. . . .

Id. at 177, 87 S.Ct. at 910.

The test was similarity stated in *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir.1981):

> A union fails to fairly and impartially represent all members of a bargaining unit, and thus breaches its duty of fair representation, when the union's conduct toward any member becomes arbitrary, discriminatory or in bad faith. . . .
>
> Bad faith or fraud is not a necessary element of a charge of unfair representation if the union's conduct is otherwise arbitrary or perfunctory (citing cases). Arbitrary perfunctory union conduct which exhibits something more than simple negligence is a breach of the duty of fair representation.

Id. at 1103.

The *Farmer* court also pointed out that a union is required to represent its members fairly and impartially, and to make an honest effort to serve the interests of all without hostility to any. To fulfill its duty, the court said: "the union must have not only enforced the provisions of the collective bargaining agreement in a non discriminatory manner, it must have also fairly represented

all segments of the bargaining unit during the negotiations of each collective bargaining agreement." *Id.* at 1103.

Any one of three elements—arbitrariness, discrimination, or lack of good faith—can create a breach of the duty of fair representation. The standard was well summarized in *Griffin v. U.A.W.*, 469 F.2d 181 (4th Cir.1972):

> First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting its rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. *Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.*

Id. at 183. (emphasis added).

In *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), the Supreme Court recognized that active or tacit consent to discriminatory enforcement of a facially neutral conduct could constitute a breach of the duty of fair representation. *Id.* at 46, 78 S.Ct. at 102. And the Second Circuit has found a duty of fair representation violation in a union's failure "[T]o provide substantive and procedural safeguards for minority members of the collective bargaining unit." *Jones v. TWA*, 495 F.2d 790, 798 (2d Cir.1974).

This circuit has recognized that the duty of fair representation is an active and affirmative obligation on the part of union leadership. The duty "requires a union to assert the rights of its minority members in collective bargaining sessions and not passively accept practices which discriminate against them." *E.E.O.C. v. Detroit Edison Company*, 515 F.2d 301, 314 (6th Cir.1975), *vacated*, 431 U.S. 951, 97 S.Ct. 2668, 53 L.Ed.2d 267 (1977), citing *Macklin v. Spector Freight Systems*, 478 F.2d 979 (D.C.Cir.1973). *See also Bonilla v. Oakland Scavenger Company*, 697 F.2d 1297, 1304 (9th Cir.1982): "The union has an

affirmative obligation to oppose employment discrimination against its members."

[21, 22] The union's obligation under the duty of fair representation is analogous to that of a fiduciary to a principal. Clearly the union has a higher standard to its members than the standard owed by the employer to the employee. This is confirmed by language in *Steele*: "It is a principle of general application that the exercise of a granted power to act on behalf of others involves the assumption towards them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty towards those for whom it is exercised unless so expressed." 323 U.S. at 202, 65 S.Ct. at 232.

Under the standard first established in *Steele*, elaborated in *Vaca v. Sipes*, and recognized by the Michigan Supreme Court in *Lowe*, and in keeping with the firm policy of the State of Michigan against racial discrimination, this Court finds the DPOA guilty of a breach of its duty of fair representation through its failure to adequately represent the interests of its black members in the layoffs of 1979 and 1980.

[23] Initially, it must be stated what this liability is *not* predicated upon. It is not predicated upon any adherence by the DPOA to a seniority-based system of layoffs. This Court finds the seniority system negotiated between the DPOA and the City to be bona fide. Nor is this liability predicated upon any duty of the DPOA to make concessions or give up demands won at the bargaining table and in the courts. The Court agrees with the DPOA that no such *per se* duty to minority members of a bargaining unit exists, and this finding of liability does not imply such a duty.

[24] The DPOA's breach of the duty of fair representation flows not merely from any reliance upon a seniority system, or a simple refusal to make concessions in the interest of minorities.

The D.P.O.A.'s liability is premised on more than this, and flows inescapably from the following findings:

1. ***A history of racial hostility and indifference to the rights and needs of black officers.***

The history of black relationships with the DPOA is one showing at the best indifference, and at the worst hostility, to the blacks by the white members of the DPOA throughout the years.

Witness after witness, all black and all police officers or sergeants, testified to the discriminatory manner in which they were treated by the DPOA. Of particular significance was the testimony of Fernon Douglas, a black police officer who came on the force in 1972 and is still a member of the Detroit Police Department. In 1978, he was elected a shift steward and also a chief steward of the DPOA. In 1978, he was nominated for sergeant-at-arms, one of the four officers of the union, but did not run after John Vella, a white member of the executive board, told him that, if he ran for sergeant-at-arms, all blacks would be removed from committee assignments. Vella denied making such a statement, but the Court finds as a matter of fact that he did.

Douglas was nominated again for sergeant-at-arms in September 1982, but, after a meeting of black stewards, he decided not to run. Additionally, he was active in proposing constitutional changes, one of which would have required that no DPOA funds be spent for litigation, except for litigation relating directly to the contract between the City and the DPOA. This amendment, and other constitutional amendments proposed by him and other black officers, were soundly defeated.

It is true that the DPOA has always represented black officers in disciplinary proceedings and court proceedings the same as they represented white officers, but this does not change the fact that in 1979 and 1980 the union did not adequately represent its black members in bargaining to prevent their layoffs.

Throughout, the DPOA has maintained opposition to all forms of affirmative action by the City and the Police Department. In addition to demanding strict seniority in its contract, it has intervened repeatedly in litigation designed either to block implementation of affirmative action, or supported those trying to block affirmative action. Testimony was introduced indicating that the DPOA has spent over $500,000 financing its anti-affirmative action litigation. And this intervention has not been limited to the City of Detroit. For example, it has filed amicus briefs supporting challenges to affirmative action in Boston, New Orleans, and Memphis. In none of these cases was the DPOA directly involved, and efforts of black members to amend the constitution to prohibit the use of union funds for such amicus briefs were soundly defeated by the organization.

It should be obvious to any neutral observer that blacks, who at one point comprised almost 40 percent of the DPOA, would be greatly offended by the use of such vast sums of money to fight what blacks believed to be efforts to achieve racial equality for them.

To partially deal with the problems of black officers, the Guardians, an organization of black police officers of all ranks, and from departments other than Detroit, was formed in the early 1960's. In addition, the Committee of Police Officers for Equal Justice (CPOEJ) was formed to deal with the problems of black officers. The DPOA avoided dealings with either the Guardians or the CPOEJ, and is hostile to these organizations. In some contexts, the DPOA's explanation that these organizations had supervisors and non-Detroit members and, therefore, created dual union concerns, would be legitimate. The Court finds, however, that in the context of past racial discrimination against blacks in the Detroit Police Department, and the past racial hostility of the DPOA, these explanations are largely pretextual.

Further support for this conclusion is found in the fact that, according to the testimony of the DPOA officials at trial, not a single black officer in their union is worthy of trust. Any member

of the Guardians is automatically "disloyal." Non-members of the Guardians, like Fernon Douglas, who still expresses black concerns yet is a militant unionist; are "not interested in the union as a whole." These explanations are pretextual, especially given the broad-based support of the Guardians, and the support from both black and white officers enjoyed by Fernon Douglas. In 1978, Lewis Colson, a black officer, ran for vice-president on the Guardian slate and received 1,100 votes. The same year, Deborah Robinson, a presidential candidate received 1,200 votes. Blacks in 1978 made their largest gains ever in terms of union positions in the DPOA, and the Court cannot believe that this political consideration did not play a role in the DPOA leadership's passivity in face of the 1979 and 1980 layoffs.

2. *The total absence of black representation in the leadership levels of the union.*

Throughout its entire history, the DPOA has been a white-dominated union. It has a board of directors, made up of 75 stewards, who are elected in each precinct and division, and from each shift. The board of directors elects from its members nine persons to serve on the executive committee, and the membership at large elects four officers; the president, vice-president, secretary-treasurer, and sergeant-at-arms. All committee appointments are made by the president, with the approval of the executive committee.

No black has ever been elected to any one of the top four positions in the DPOA in its 41-year history. There have only been two black members who have served on the executive board, and the board of directors has only 18 nonwhite members.

The most significant committee of the DPOA is the grievance committee, which consists of three members, who, along with the four elected officers, constitute the bargaining committee. No black has ever served on the grievance committee. Nor has any black ever served on the finance committee, another major committee of the DPOA. As stated earlier, this Court rejects explanations that there were not sufficient "trustworthy"

blacks to fill these positions or that "political patronage" should be the only criterion for union leadership when this patronage operates to exclude blacks.

3. *The massive nature of the 1979 layoffs—one-quarter of the DPOA membership, one-half of the black membership, a loss of approximately $500,000 a year in dues, and the totally perfunctory and passive behavior of the union leadership.*

As early as the Spring of 1977, the City began efforts to obtain DPOA agreement to a proposal that future layoffs be carried out in a manner that would avoid having a racially discriminatory impact on blacks and women. These proposals were strongly and consistently resisted by the DPOA. Affirmative action layoff procedures were proposed again in 1978, and throughout discussions and negotiations the Union would at no time back off its position on seniority and its refusal to consider any type of affirmative action layoffs.

Finally, the first layoffs came in October 1979. Mark Ulieny, the City's Labor Relations Director, advised Mr. Watroba, by letter on September 27, 1979, that 400 police officers would be laid off as of October 12, 1979. Although the position of the DPOA had been that the City was merely posturing, as of September 27, 1979, it knew that it was no longer posturing. Nonetheless, the DPOA did nothing to avert the 1979 layoffs. 71 percent of those laid off at that time were black officers. No effort was made to use the same formula successfully used on 1975, when a majority of those to be laid off were white, and no other effort was made, as it was in 1981, when the vast majority of those to be laid off were white.

In February 1980, the City again proposed, as to layoffs, that seniority should be used only to the extent that it does not reduce the proportions of minority group members or females within the bargaining unit. This proposal was flatly rejected by the DPOA.

Opinion

The record is clear that the DPOA was well aware, as early as the Spring of 1980, that upwards of 700 police officers were to be laid off in the fall, and that the overwhelming majority of those to be laid off would be black. Even though officers of the DPOA testified that they thought the City was merely posturing, it is clear that they knew that more layoffs were coming, and it was clear the DPOA was not going to take significant action to avoid them. In the August 18, 1980 issue of *Tuebor*, the union newsletter, there is specific mention of the anticipated layoff of more than 700 DPOA members within a matter of days.

On August 29, less than two weeks after the *Tuebor* issue which described in great detail the potential layoffs, Mayor Young sent a letter to Watroba inviting him to a meeting to discuss ways of averting the scheduled layoffs. In that letter, the Mayor spoke of the impending layoffs of 690 Police Officers, and emphasized the disastrous effect it would have upon the City's past affirmative action:

> But there is an additional reason why these layoffs will hurt us all. During the past seven years, we have been working to create a police department integrated by race and sex through an affirmative action program. This program was an essential pre-condition to establishing harmonous police-community relations, without which our police can never effectively carry out its duties.
>
> Because these layoffs are being made according to strict seniority, in accordance with the present contract, and not in pursuance of our affirmative action program, they will drastically reverse our progress towards the goal of a fully integrated police force, and we will be moving towards a department again composed predominately of white and male officers.

The Mayor then made specific proposals to the Union:

> Recent negotiations for a new contract have proved fruitless and the issues are about to be submitted to final

arbitration, as required by existing law. This is one such issue. However, it will be many months before a decision is made. As a temporary measure, without prejudice to our respective positions before the arbitrator, I suggest the following alternative procedures for the impending layoffs:

1. Instead of seniority being the sole criterion for layoffs, thus resulting in grossly disproportionate layoff of blacks and women, we agree that layoffs be made on the basis of separate lists, such as the plan for proportions which was approved by the Sixth Circuit Court of Appeals recently, as an appropriate means of implementing our affirmative action program.

Or, if you prefer;

2. Instead of any layoffs, a 13.8 reduction in the Police Department payroll be agreed upon, with by equal reduction by all officers of workdays or some other equitable method.

Governor Milliken's recent proposal for applying an affirmative action program to the layoff of State employees has just been approved by the Michigan Civil Service Commission and serves as an example of what we can do for Detroit by mutual agreement. I realize the shortness of time. But our commitment to the welfare of our community compels all of us to do what we must to avoid moving backward towards racial hostility and divisiveness.

When asked what the union response to the Mayor's proposal was, Watroba replied that seniority was the cornerstone of unionism, and that the DPOA would not, under any circumstances, negotiate separate layoff lists in which race was a factor in determining who was to be laid off. He said that, if they were going to deal with the Mayor, they would have to deal on the basis of his second proposal, a 13.8 percent wage reduction, and not his proposal for separate layoff lists. He said, however, that, while the union was willing to pursue some quid pro quo in the negotiations with the Mayor, it was never going to agree to 13.8

percent. He said that, if 13.8 percent was the bottom line, the answer of the union would have to be no.

Watroba responded to the Mayor's letter on September 3, 1980, stating, inter alia:

> We fully recognize our duty to bargain on behalf of all of our members. Our seniority clauses have been bargained with the interest of our total membership in mind. They cannot be cast aside when the very situation they were designed to cover is about to occur. You will recall the City voluntarily withdrew its demands for proportionate layoffs of blacks and whites in the last rounds of negotiations.
>
> * * * * *
>
> The City must be willing, in the process, to negotiate about all factors leading to the budget shortfalls, including ill-advised, ill-timed promotions, the elimination of artificial quotas, and restraints upon *equal* opportunity. If you, without pre-conditions eliminating areas of bargaining, will personally begin marathon good-faith bargaining designed to settle the contract, rather than enhance images, we are prepared to start at 7:00 p.m. on September 8, 1980, or at your earliest convenience.

The Mayor responded to Watroba's letter the same day indicating his willingness to bargain and to meet with reference to the layoffs. He made the further observations in that letter:

> First, in response to your statement that no previous "meaningful proposals were made to avert the layoff" by the City, let me remind you that on April 2, 1980, during negotiations with the DPOA, we proposed that pay rates be reduced to the level of the pay increases that other City employee unions accepted. This would have avoided all police layoffs.
>
> Again, on June 17, the City asked the DPOA to waive retroactive pay adjustments due from July 1977 to December 1978, and to waive the COLA roll-in due July 1, 1980.

In return for agreement of this proposal, the City offered to reduce the scheduled layoff by 440 employees. As you will recall, the DPOA rejected both of these proposals.

Second, I must question the extent of your concern about the impact of the layoffs on affirmative action gains in the Detroit Police Department. The DPOA's brief on economic issues, prepared for the Act 3-12 Arbitration Panel in 1977, said: "The DPOA does not question management's right to determine manpower levels, but questions whether veteran police officers should subsidize new hires." This language makes it apparent to me that the DPOA had no qualms about sacrificing the jobs of new police officers to finance its economic demands.

* * * * *

In closing, let me remind you that affirmative action as a concept is not negotiable. It is mandated not only by the City Charter, but also by State and Federal law, and by the courts, as well.

It is also my opinion that the duty to implement affirmative action does not stop just because we have found more equitable ways to hire new police officers. Rather, we have a double duty—that we are now challenged to find equitable ways to implement the September 5 layoffs.

The fact that we have found ways to remove hiring barriers at the front door does not relieve us of our obligation to find ways to remove comparable barriers at the back door now that the circumstances require it.

In the meantime, the executive board of the DPOA met on September 2. While that meeting was in progress, Lewis Colson, executive director of the Guardians, hand-delivered a letter to Watroba. Watroba testified he left the meeting to receive the letter and to talk to Colson. In that letter, the Guardians called for action other than standing merely on seniority with reference to layoffs. The letter, in pertinent part, said:

Opinion

The Guardians are extremely disturbed by the planned layoffs of 690 officers scheduled for September 5, 1980. The reported statistics indicate that these layoffs will have a disproportionate effect on minority and female officers. When considered in connection with the 400 officers laid off in October, there is a real reversal of the progress that has been made to integrate the police force at all levels.

As you know, Mayor Young has indicated he is willing to discuss other options to avert the proposed layoffs. We understand his proposals call for the *temporary* institution of separate seniority lists, or a *temporary* reduction of work hours and pay. We believe that either of these suggestions is reasonable, and we urge you to accept one of them, or at the very least, to negotiate in good faith with the Mayor to avoid the layoffs. As you are aware, prior to the introduction of the City's affirmative action plan for the department the minority representation on the police force was less than 5 percent. Over the last six years, as the direct result of the affirmative action plan, the minority representation rose to over 33 percent prior to the October 1979 layoffs. However, the impending layoffs of 693 police officers will reduce the minority representation to less than 26 percent.

It is common knowledge in our community that the integration of the police force, to the extent it has occurred, has had a profound and positive effect on police and community relations. The wide spread alienation of black Detroit residents from the Police Department has changed. Individual citizens and community groups alike are beginning to identify and work with the police. The affirmative action program has been in effect since 1974. Since that time there has been a 30 percent reduction in crime and, most importantly, no police officer has been killed in the line of duty.

Finally, we believe the Union is duty bound, by its own constitution and by law, to protect that job security of all its members. Article III, § 2 of the Union's Constitution requires the Union's leadership to promote job security.

> Additionally, as the DPOA is the exclusive bargaining agent for all of the police officers, it owes a legal duty to fairly represent *all* officers—black and white, male and female. If the DPOA stands idly by and watches minority and female officers be subject to disproportionate layoffs, when the Mayor has offered reasonable ways to avert this result, the Guardians will believe that the DPOA intends this result. We will, therefore, view this an intentional act by the DPOA to violate the duty of fair representation owed to minority and female members, and we will take appropriate action.
>
> This letter was never answered.

On the eve of the layoffs, September 5, 1980, Watroba met with the Mayor and others in the Mayor's office for approximately three and one half hours. The DPOA at that meeting proposed a "25 and out" plan and the City adoption of a Chrysler model, by which there would be a freeze or a deferral of benefits otherwise due, with some kind of a pay-out at a later date. It also proposed there be discussion of standards and criteria concerning promotions from bargaining units. The union rejected the dual seniority lists, and also the Mayor's 13.8 percent pay reduction proposal. They also rejected a lower figure of either 12 or 12.8 percent. Additionally, Watroba rejected the Mayor's suggestion that the membership be permitted to vote on whether to accept a 13.8 percent reduction or some other lower percentage reduction.

Nothing came of the meeting. The Union would not budge on its opposition to a pay reduction or separate seniority lists, and the layoffs went into effect the next day.

At no time did the union make any reasonable effort to avert the layoffs. This is in stark contrast to the actions taken by the DPOA in 1975 and 1981 when layoffs were threatened and the vast majority of officers who would be laid off were white. See discussion of these concessions *infra*. Here the layoffs affected principally black officers, and no realistic efforts to avert the layoffs were made.

The union's response to the threatened layoffs of 690 officers, which would, with the 1979 layoffs, total one-quarter of their union and one-half of the black membership, was totally perfunctory. No special meetings were called at any level of the union. The union officials who took the stand at trial could not even recall if the layoffs were discussed at the routine, regular meetings which took place during the period. No response at all was given to Colson's letter—it was simply referred to counsel, and the DPOA leadership awaited this lawsuit. No votes regarding any possible compromises were taken at any level of the union, which could have at least allowed the laid-off officers to express their views and test its support in the union. It is this perfunctory behavior of the DPOA officials that breached the duty of fair representation here, not any per se refusal to make concessions or agree to affirmative action layoffs.

4. *The present day failure to make any serious efforts to assist these black officers.*

It is significant that the 1983 bargaining demands of the union do not in any way address themselves to the recall of laid-off officers. The DPOA contended at trial that some bargaining demands tangentially affect the layoffs, such as the reduction of police reserves, and the demand that there be only one call to any police car at any time, but these demands are so tangential as to have little, if any, effect on layoffs. The actual fact is that the union, even in its 1983 demands, evinced no real interest in getting black laid-off police officers back to work. Again, given the DPOA's history, this Court cannot believe that this behavior would be the same if one-half of its white membership was laid off.

5. *A history of concessions and prompt union action to avert layoffs in 1975 and 1981 when the jobs of white officers were at stake.*

In 1975, a layoff of police officers, most of whom would have been white, was threatened, and litigation was commenced, which was assigned to Judge Damon Keith, then a United States

District Judge. Judge Keith mediated a solution. The net result of the mediation was to avert layoffs of police officers, the vast majority of whom would have been white. An agreement was reached that, during a period of 18 months, each member of the bargaining unit would take 14 days off without pay, and would get an additional ten days off with pay, and that these 24 days could be taken off during the 18 month period. Other minor concessions were made, and layoffs were averted.[18]

In 1981, further layoffs were threatened because of the City's financial condition. The union agreed to a pay freeze to protect the jobs of the officers. At that time, the officers who would have been laid off were largely white officers. In return for the pay freeze, the DPOA obtained improved longevity, better vacation, better dental program, and the elimination of a 55 year old retirement age, so that officers could retire after 25 years of service. It should be noted, however, that this was basically a concession contract, with no wage increases at a time of fairly serious inflation in this country.

The actions of the DPOA in 1975 and 1981, when largely white officers would have been involved in layoffs, resulted in concessions to protect jobs. This activity stands in sharp contrast to its actions in 1979 and 1980 when the layoffs affected principally black officers.

The union argues that the situation was different in 1975 and 1981. The Court recognizes that there are differences. The 1975 solution did not appear to be a very popular one with the City. The 1981 solution took place at a time of great financial

[18] During the first 12 months of the agreement, the first time that an officer would call in sick, that officer's sick bank would not be reduced, but rather one of the 10 paid days would be reduced and used in a sick bank as a sick day as opposed to depleting the sick bank. It was further agreed that, with reference to holidays worked, all officers would receive 12 hours compensatory time as opposed to payment for working on holidays, and for a 12 or possibly 13 month period, they were to be paid for less hours of work, so that for every two week pay-period they would receive 76 hours of pay rather than 80 hours of pay.

distress for the City, and the union was told that the City was on the verge of bankruptcy.

However, these differences do not explain the basic fact that, when white officers were to be laid off, the union did *something;* when the overwhelming majority were blacks, the union did *nothing.* It is not the business of this Court to decide precisely what the DPOA should have done in 1979 and 1980. The duty of fair representation creates no such guidelines. The duty only commands that the union, when racial minorities are involved, behave in a manner that is representative, not perfunctory and passive. This is what the DPOA failed to do here.

The DPOA has offered other explanations for its actions in 1979 and 1980. It must be emphasized that this Court has no role in, nor desire to enter into, the collective bargaining process, and question collective bargaining decisions made by the DPOA in the course of negotiations with the City. The union has a wide range of discretion in bargaining insofar as these efforts are reasonable. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953).

Thus, this Court is not concerned with any reasonable activity of the DPOA in collective bargaining, even certain activity which sacrifices the interests of minorities for the majority. This Court is only concerned with activity that is arbitrary, racially discriminatory, and not in good faith. And this Court finds that in its representation of its black members, the DPOA's perfunctory and passive behavior in 1979 and 1980 breached the duty of fair representation.

This finding of liability of the DPOA is not predicated upon any legal finding that its defense of a bona fide seniority system was per se wrong. It is recognized that there have been no prior judicial findings of intentional racial discrimination against the DPOA as there were against the City of Detroit, and it is well recognized by this Court that Title VII protects from liability bona fide seniority systems. *See Teamsters* and *Stotts, supra.* It was the DPOA's action *as a whole*, not the defense of any

particular position, that was unreasonable and breached the duty of fair representation here.

There is nothing in *Stotts*, or any other case, that would prevent a union and employer from mutually and voluntarily agreeing to an affirmative action layoff system in the future. Nothing compels a bargaining representative to limit seniority clauses solely to the relative lengths of employment of respective employees. *See Ford Motor Co. v. Huffman, supra. See also Burchfield v. United Steelworkers of America*, 577 F.2d 1018 (5th Cir.1978). Seniority rights are creatures of contract, always subject to modification. Thus, there is no merit to the DPOA's argument that there were legal obstacles to a *voluntary* agreement regarding affirmative action layoffs.

For the reasons given, the Court finds that the DPOA has breached the duty of fair representation owned to its minority members and must respond legally.[19]

The Court finds no liability of the DPOA under the Thirteenth Amendment. It has found no case law applying to the Thirteenth Amendment under the facts of this case, and declines to do so here. The Court finds no reason to consider the claim under 42 U.S.C. § 1981 in light of the result reached here. The Court finds no violation of 42 U.S.C. § 1985(3). *See* n. 14 *supra*.

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[19] This finding has support in *Brown v. Neeb*, 644 F.2d 551 (6th Cir.1981):

> We find the Union's refusal [to agree on wage reductions] disturbing. Where large numbers of union members scheduled for layoff are members of a racial minority, a union's refusal to take pay cuts to avert layoffs is significant, *prima facia* evidence of racial discrimination. This is especially true in a situation where the laid-off minorities were recently hired under an affirmative action plan and/or where the union has opposed affirmative action.

V

The Court having determined that the defendant DPOA has breached its duty of fair representation, it now must turn to a consideration of relief.

In determining relief, the Court retains the full measure of its equitable and legal power to fashion a remedy that is just and equitable to all parties.

The Supreme Court in *Steele, supra*, said:

> We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty,

323 U.S. at 207, 65 S. Ct. at 234.

In fashioning a remedy, this Court, as a chancellor, does not desire to punish defendants for what they have done in the past, but to fashion a remedy that will insure that in the future the DPOA will adequately represent, as a bargaining agent, all of its members, and will not discriminate against its minority members.

No assessment of damages will be made against the DPOA, but rather, an order will be entered guaranteeing that the black members of the DPOA have their just and fair say in the operation of the union. In this way, positive steps towards preventing a future breach in the duty of fair representation will be taken.

If the black members of the DPOA are given their proper representation in the leadership structure of the DPOA they can, in the future, protect minority members against a breach of the duty of fair representation by the Union. It is this goal that this Court seeks. The Court is only intervening in the internal affairs

of the DPOA to the extent necessary to assure adequate representation of black members in the relationship between the DPOA and the City of Detroit.

[25] Therefore, the following relief against the DPOA will be ordered: within 12 months of the date of this opinion, all committees of the DPOA, especially grievance and finance, the board of directors, and the executive board shall reasonably reflect the racial composition of the union.

At the end of 12 months, plaintiffs shall notice a hearing before this Court so that the Court can determine if there has been substantial compliance with this order, and a good-faith effort to reach the goals set forth above. At that hearing, the Court will take such action as it deems necessary against the DPOA, if it has failed to comply with this mandate.

VI

For the reasons given in this opinion, a judgment will issue embodying the following:

1. The previous determination of this Court that the City breached its affirmative obligations to plaintiffs in violation of their rights under the Fourteenth Amendment in the layoffs of 1979 and 1980 is reaffirmed.

2. The City of Detroit is ordered to recall all black police officers laid off in the 1979 and 1980 layoffs who desire to return to the force, and who are qualified for police work, within 180 days, and submit a plan to accomplish this to this Court within 30 days.

3. No back pay will be awarded to any recalled officer, but all recalled officers will be entitled to the full seniority they would have had, if they had remained on duty from the time of the layoffs until the time of the recall.

4. The City of Detroit shall not lay off, suspend, or discharge any police officer, except for disciplinary reasons, without

the prior approval of this Court. This order will remain in effect until the further order of this Court.

5. Any white police officer laid off in the 1979 and 1980 layoffs who has seniority over any black officer recalled may, within 30 days, petition this Court for consideration of his or her case, and for consideration of his or her recall. The Court expresses no opinion as to the merit of any such claim.

6. The DPOA breached its duty of fair representation under Michigan law in bargaining on behalf of plaintiff police officers.

7. The DPOA is ordered, within 12 months, to remedy its breach of the duty of fair representation by having a reasonable representation of blacks in the leadership structure of the DPOA, including, but not limited to, the board of directors, all committees, and the executive committee. Within 12 months from the date of this opinion, the Court will conduct a further hearing to determine if reasonable representation has been achieved and, if it has not, to determine what remedies the Court will order against the DPOA for its failure to comply with this order.

This opinion shall constitute the findings of fact and conclusions of law required by F.R.C.P. 52(a).

Opinion

NAACP, DETROIT BRANCH, The Guardians, Inc., Brady Bruenton, Cynthia Martin, Hilton Napoleon, Sharron Randolph, Betty T. Roland, Grant Battle, Cynthia Cheatom, Evin Fobbs, John Hawkins, Helen Poelinitz, on behalf of themselves and all other similarly situated, Plaintiffs,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA), David Watroba, President of the DPOA, City of Detroit, a Michigan Municipal Corporation, Mayor Coleman A. Young, Detroit Police Department, Board of Police Commissioners, Chief William Hart, Governor William Milliken, and The Michigan Employment Relations Commission, Defendants.

CIVIL ACTION NO: 80-73693

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

620 F. Supp. 1173; 39 Fair Empl. Prac. Cas. (BNA) 192; 40 Empl. Prac. Dec. (CCH) P36, 257

October 21, 1985

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OPINION

Following trial on this matter,[1] plaintiffs filed a petition for attorney fees and costs to be assessed against defendants Detroit Police Officers Association (DPOA) and the City of Detroit pursuant to 42 U.S.C. § 1988, which states in pertinent part:

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985 1986] . . . , the court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney's fee as part of the costs.

On January 17, 1985, the Court held an evidentiary hearing on the motion for fees, and it became clear that the parties disputed the validity, appropriateness and compensability of both the fees and costs sought by plaintiffs. In addition, the DPOA argued that no fees should be assessed against it since the plaintiffs had not prevailed against it in a §§ 1981, 1982, 1983, or 1985 claim.

The Court referred the matter to Magistrate Komives, as a Special Master, to conduct an evidentiary hearing on the following issues:

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[1] This civil rights case arose out of the layoff of black police officers in Detroit in 1979 and 1980. The opinion is reported at 591 F. Supp. 1194 (E.D. Mich. 1984).

Opinion

A. As to fees sought:

1. The actual time being sought by each of the claimants.

2. The appropriateness of the time claimed, as demonstrated by relevant documentation.

3. The extent to which there is impermissible duplication.

4. The extent to which the time for which compensation is sought is reasonable.

5. Specification of which time claimed is allocable to the City defendants, the DPOA, or both.

6. Circumstances pertaining to adjusting the lodestar fee.

7. With the exception of the appropriate rate to be applied, which the Court shall decide, determinations about any other factual matters relating to fees that the parties may put into dispute.

B. As to costs:

1. Determination of what costs are being claimed.

2. Determination of the appropriateness of the costs claimed, in light of the relative documentation.

3. Allocation of costs to the DPOA, City defendant, or both.

4. The extent to which the costs claimed are reasonable.

5. Any other factors relating to costs that the plaintiffs may put into dispute.

The Magistrate held six days of hearings, and out of the morass of factual disputes prepared an extremely thorough and

helpful Report and Recommendation, as well as exhaustive findings on the factual issues before him. In view of the fact that the referral was to the Magistrate as a Special Master, this Court will review the Magistrate's findings under a clearly erroneous standard. See *Brown v. Wesley's Quaker Maid*, No. 84-1141 (6th Cir. Aug. 27, 1985).

In addition, there are legal issues not referred to the Magistrate that this Court must determine. These include the threshold question whether the plaintiffs were prevailing parties in this action, the question whether the DPOA is liable for plaintiffs' be allocated between the two defendants. Part I of this opinion will discuss these issues. Part II will determine the reasonable rate per hour to be paid to the various attorneys in the case. Part III will determine the number of reasonably compensable hours. Part IV will determine costs.

I

In order to recover attorney fees and § 1988, a plaintiff must be a prevailing party. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Court pointed out:

> A plaintiff must be a "prevailing party" to recover an attorney's fee under § 1988. The standard for making this threshold determination has been framed in various ways. A typical formulation is that "plaintiffs may be considered "prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (CA1 1978). This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable."

Id. at 433.

Opinion

Although the Magistrate made specific findings regarding the extent to which plaintiff prevailed, the question of whether plaintiff is a prevailing party is a legal question not subject to the clearly erroneous review standard used for the Magistrate's Findings of Fact. Nonetheless, the Court agrees with the Magistrate that plaintiffs did prevail against both the City of Detroit and the DPOA.

The plaintiffs had significant successes against the City. The Court determined that the City had breached its affirmative obligations to the plaintiffs, in violation of their rights under the Fourteenth Amendment. The Court ordered significant relief, including the recall of all black police officers laid off in 1979 and 1980, and the recall of all white officers laid off. The Court further enjoined the City from suspending, discharging or laying off any police officers in the future, except for disciplinary reasons, without prior approval of the Court. Finally, the Court determined that the City had an affirmative duty to take all necessary steps to eliminate all vestiges of prior employment discrimination in the Detroit Police Department.

The City argues that the plaintiffs in fact did not prevail against them because it succeeded in it biggest objective, that is, the defense against any money claims. The City argues that, at most, plaintiffs won an acceleration of recalls, since the City intended to make some recalls anyway. The Court rejects this argument. There is no question but that the plaintiffs prevailed against the City. The fact that money claims and back pay were not ordered does not mean that plaintiffs were not prevailing parties. Plaintiffs succeeded in many significant issues in the litigation, which achieved much of the benefit the parties sought in bringing suit. Therefore, under Hensley, the plaintiffs were prevailing parties against the City of Detroit.

By the same token, plaintiffs were prevailing parties against the DPOA. The Court found that the DPOA breached its duty of fair representation under Michigan law. This was a significant issue. The Court ordered, as a remedy of this breach of duty, the

establishment of reasonable representation of black officers in the leadership structure of the DPOA within 12 months of the opinion. The DPOA really does not argue that plaintiffs did not prevail, and as a threshold matter it is clear the plaintiffs were prevailing parties against the DPOA. The DPOA argues, rather, that no fees should be awarded against it because it was not held liable under § 1981, or any other civil rights statute.

The Court rejects the DPOA's argument that plaintiffs cannot recover attorney fees against it under § 1988 because it was not held liable for any violation of §§ 1981, 1983 or 1985. The resolution of this question requires an analysis of the Court's holding in the underlying case, as well as analysis of the legislative history of § 1988 and the cases interpreting § 1988.

In its opinion deciding this case, *NAACP v. Detroit Police Officers Association*, 591 F. Supp. 1195 (E.D. Mich. 1985), the Court found that under Michigan law the DPOA breached the duty of fair representation owed to its black members. In discussing the DPOA's breach, this Court said:

> "This finding of liability of the DPOA is not predicated upon any legal finding that its defense of a bona fide seniority system was per se wrong. It is recognized that there have been no prior judicial findings of intentional racial discrimination against the DPOA as there were against the City of Detroit, and it is well recognized by this Court that Title VII protects from liability bona fide seniority systems. See *Teamsters* and *Stotts, supra*. It was the DPOA's action as a whole, not the defense of any particular position, that was unreasonable and breached the duty of fair representation here."

Id. 1219.

As to plaintiffs other claims, the Court held:

> "The Court finds no liability of the DPOA under the Thirteenth Amendment. It has found no case law applying to the Thirteenth Amendment under the facts of this case,

> and declines to do so here. The Court finds no reason to consider the claim under 42 U.S.C. 1981 in light of the result reached here. The Court finds no violation of 42 U.S.C. § 1985 (3)."

Id. at 1220 (emphasis added).

The legislative history of § 1988 indicates that the Congress intended fees to be awarded in such situations. In *Maher v. Gagne*, 448 U.S. 122 (1980), the Supreme Court discussed this legislative history in a footnote:

> "The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying H.R. 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:
>
> > 'To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales v. Haines*, 486 F.2d 880 (7th Cir., 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is depositive. *Hagans v. Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, see *Hagans v. Levin, supra; United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." *United Mine Workers v. Gibbs, supra*, at 725. H.R. Rep. No. 94-1558, p. 4, n. 7 (1976)."

Id. n.15 at 132.

The *Maher* Court went on to note, in the text of its opinion:

> "We agree with the courts below that Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication. As the Court of Appeals pointed out, such a fee award "furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues." 594 F.2d, at 342. It is thus an appropriate means of enforcing substantive rights under the Fourteenth Amendment."

Id. at 132-33.

A number of circuit court cases have approved the award of attorney fees where plaintiffs have prevailed on state claims. They have generally relied upon the legislative history cited in *Maher, supra.*

In *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977), the court affirmed a fee award where the plaintiffs prevailed only on a voting rights claim under state law but had raised a substantial federal claim based on the same operative facts. It relied upon a footnote to a House Report on the Bill enacting § 1988, and said:

> "[Nonetheless, the language quoted above appears to us to be a clear-cut indication that Congress considered the exact problem with which we are now confronted and provided an express indication as to how the general language of the 1976 statute was intended to be applied. In our instant case, fees could clearly have been awarded if Plaintiffs had prevailed on their federal constitutional claim. And, of course, for the reasons stated above, they can be

awarded under present facts (i.e., the District Court's granting of relief on the alternative state claim basis)."

Id. at 394.

In *Williams v. Thomas*, 692 F.2d 1032 (5th Cir. 1982), cert. denied, 462 U.S. 1133 (1983), the court awarded fees where the plaintiff, a prisoner, sued a deputy for assault and battery and for a violation of § 1983. The jury found that the deputy committed assault and battery but did not violate § 1983 because he was acting in good faith. The court noted that the courts, as a matter of policy, will affirm cases on pendent claims where possible rather than reaching constitutional claims, and noted that allowing fees in such cases furthers a congressional goal of encouraging suits to vindicate civil rights while still avoiding unnecessary constitutional decisions. It said:

> "These cases demonstrate that the federal courts are award of the fact that often a court will affirm a judgment on a pendent, noncivil rights claim when to do so will allow it to avoid an unnecessary decision on a difficult constitutional issue. For example, in this case, this Court has refused to decide whether the good faith defense was improperly rejected by the district court since Williams would recover compensatory damages under the pendent claim, regardless of this Court's decision on the good faith issue. Moreover, by allowing a recovery of attorneys' fees 'the congressional goal of encouraging suits to vindicate constitutional rights [is furthered] without undermining the well-settled judicial policy of avoiding unnecessary decisions [on] important constitutional issues.' *Maher*, 100 S. Ct. at 2577."

Id. at 1036.

There are many cases awarding fees where a plaintiff prevailed on an alternate claim that arose out of a common nucleus of operative facts.[2] The basic test for determining whether fees

[2] See Annot. "Civil Rights Attorney Fees," 43 ALR Fed. 243 at @ 18; see, e.g., *Lund v. Affleck*, 587 F.2d 75 (1st Cir. 1978); *Reel v. Arkansas*

should be awarded when a party prevails upon the non-civil rights portion of a case where the civil rights issue has been properly raised is whether the noncivil rights claim arose out of a common nucleus of operative facts. If it did, then plaintiff is entitled to recover attorney fees, even though the Court did not reach or rule on the civil rights claim.

Here, the Court found that DPOA breached its duty of fair representation, and awarded substantial relief to plaintiffs. The Court did not reach plaintiffs' claim under § 1981 because that claim was mooted by the finding of the breach of the duty of fair representation. Plaintiffs' § 1981 claim and duty of fair representation claim arose out of a common nucleus of operative facts, i.e. the DPOA's actions as a whole with regard to the 1979 and 1980 layoffs of black officers. To hold that the DPOA is not liable for attorney fees in this case would be to unjustly deprive prevailing plaintiffs of their right to attorney fees under § 1988.[3]

Smith v. Robinson, 468 U.S. , 104 S. Ct. 3457 (1984), relied upon by defendants, does not hold to the contrary. In *Smith*, the Court pointed out that where petitioners present entirely different claims for different relief and prevail only on the non-fee claim, they are not entitled to a fee award simply because the other claim was a constitutional claim. The Court state, however:

> "As the legislative history illustrates and as this Court has recognized, § 1988 is a broad grant of authority to courts to award attorney's fees to plaintiffs seeking to vindicate federal constitutional and statutory rights. (citations omitted) Congress did not intend to have that authority extinguished by the fact that the case was settled or resolved on a nonconstitutional ground." 468 U.S. at , 104 S. Ct. at 3466 (emphasis added).

Department of Corrections, 672 F.2d 693 (8th Cir. 1982); *Burchett v. Bower*, 470 F. Supp. 1170 (D. Ariz. 1979).

[3] See quote from *Maher, supra*, p. 8.

The *Smith* court went on to add that the statute upon which the plaintiff prevailed, the Education to the Handicapped Act, was so comprehensive that it was the exclusive remedy for plaintiff's claims. Thus, in *Smith*, plaintiff had no § 1983 claim at all. The Court further held that plaintiff's other claim, a due process claim regarding the lack of impartiality of a state hearing officer, was so entirely different from plaintiff's substantive claim that no fee would be awarded based on it. This is no different than the requirement that fees only be awarded when a plaintiff prevails on non-free claims, if the fee and the non-fee claim arise out of a common nucleus of operative facts.

Nor does *Hensley v. Eckerhart*, 461 U.S. 424 (1983), require a different result. Although *Hensley* recognizes that the degree of plaintiff's success is an important factor in determining a reasonable attorney fee, *Hensley* also clearly recognized that fee awards are appropriate where fee and non-fee claims involve a common core of facts based upon related legal theories. The Court said:

> "In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have achieved" . . . The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.
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> "In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of

> the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."

Id. at 433-35 (emphasis added).

And, in conclusion, the Court stated:

> "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. . . ."

Id. at 440.

It is clear that plaintiffs' breach of the duty of fair representation claim was based on a common core of facts with its § 1981 claim. These claims were not "discrete." Therefore, even under Hensley, the plaintiffs are entitled to recover attorney fees against the DPOA.

The DPOA might more appropriately have argued that the Court's rejection of the Thirteenth Amendment claim, the § 1983 claim, and the § 1985 claim against it on the merits required, under *Hensley* a downward adjustment of the fee based reasonable rate is the start, but not the end, of the determination of a reasonable fee under § 1988. A reasonable fee must also take into account the plaintiff's degree of success.

However, analysis of *Hensley* indicates that no such downward adjustment is warranted in this case. Hensley requires the Court to ask two questions in this regard:

> "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?"

Id. at 435.

Hensley mandates that the amount of fee be reasonable in relation to the result obtained.

Opinion

As the above discussion has made clear, plaintiffs' claims against the DPOA were related. Exercising its equitable judgment in the light of the considerations identified in Hensley, the Court finds as a matter of fact that plaintiffs achieved a level of success against the DPOA that makes the hours reasonably expended[4] a satisfactory basis for making a fee award against the DPOA.

The final threshold issue before the Court is the allocation of the fees and costs to be awarded against the City and the DPOA.

The Magistrate found that, prior to the February 22, 1984 summary judgment finding liability on the part of the City,[5] the effort expended by plaintiffs against the City and against the DPOA were 50-50. This finding of allocation is not clearly erroneous.

The Magistrate further found that, after February 22, 1984, the effort expended was 10% against the City and 90% against the DPOA, and based his findings on the following:

1. The issues remaining for trial were liability and remedy against the DPOA, and remedy only against the City.

2. Most of the case at trial went to the liability of the DPOA.

3. Plaintiffs' trial brief, findings of facts, and witnesses presented went mostly to the DPOA issues and not to the City.

4. In making its case against the City, the plaintiffs relied heavily on the City's own witnesses.

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[4] See discussion of reasonably compensable hours, *infra* at 29.

[5] See the discussion of that finding in *NAACP v. DPOA*, 591 F. Supp. 1194, 1199 (E.D. Mich. 1984).

Opinion

The Court finds that this allocation finding of 90/10 is clearly erroneous. The Magistrate, while looking at certain facts about the trial, failed to appreciate that the issue of remedy against the City took extensive trial time and trial preparation, and resulted in the establishment of important legal precedents.

A review of the transcript and opinion in this case clearly show that substantial time in the trial of the case, in the preparation for trial, and in the final briefing of the case was spent in presenting evidence and argument going to the remedy against the City of Detroit. After the general introduction, 11 printed pages of the opinion (591 F. Supp. 1199 to 1210) were devoted to a discussion of the remedy against the City and the details for its implementation. Another 11 printed pages of the opinion (591 F. Supp. 1210 to 1220) were devoted to discussing the liability and remedy against the DPOA.

This allocation of pages in the opinion is approximately accurate on the allocation of time, effort, and energy expended by the Court and counsel.

The Court tried the case and is aware of the issues, and the time expended on each issue. It appears clear to the Court that 50% of the time, energy, preparation, trial, post-trial briefing and post-trial argument was devoted to the case against the City and 50% was devoted to the case against the DPOA, both before and after the February 1984 summary judgment.

Thus, the attorney fees and costs to be awarded against defendants will be divided equally between the City of Detroit and the DPOA.

II

The attorneys in this case have made the following claims as a proper rate for their fees: Thomas Atkins, $200 an hour; Jeanne Mirer, $125 an hour; James McGinnis, $100 an hour; Michael Barnhart, $125 an hour, and Gary Benjamin $100 an

hour. Samuel McCargo, who represented Mr. McGinnis in his claim for fees, has asked for attorney fees, but has failed to specify an hourly rate. Ronald Reosti, who represented Ms. Mirer and Mr. Benjamin in their claims for fees, has asked for a rate of $150 an hour. Each fee petitioner, other than Mr. Reosti and Mr. McCargo, has asked for 100% enhancement of his or her normal rate.

The issue of rates was not referred to the Magistrate, and he made no recommendation on the hourly rate to be received by fee claimants. The Magistrate did recommend an enhancement of 25%, based upon plaintiff's success in obtaining a ruling of first impression and upon a risk and contingency factor discussed in *Craik v. Minnesota State University Board*, 738 F.2d 348 (8th Cir. 1984). As this finding is not a factual finding, it is not subject to the clearly erroneous standard, and the Court can review de novo the Magistrate's recommendation for enhancement.

42. U.S.C. § 1988 and other applicable civil rights fee-shifting statutes provide for a "reasonable" fee. As pointed out in Hensley, supra:

> The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. H.R. Rep. No. 94-1558, page 1 (1976). Accordingly a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. Rep. No. 94-1011, page 4 (1976) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968)).

Id. at 429.

The *Hensley* Court further pointed out:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable

> hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services.

Id. at 433.

The Sixth Circuit in *Louisville Black Police Officers' Organization v. City of Louisville*, 700 F.2d 268 (6th Cir. 1983), has provided district courts with some guidance in the difficult task of determining a reasonable hourly rate. In that case, the Court said that the standard for a reasonable hourly rate was the fair market value for the attorney's services, an important indicator of which is the hourly rate charged by the attorney. Courts may also look for guidance to the rates customarily charged in the community for similar services. See also *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979).

The lead counsel throughout, and the person most responsible for the successful termination of this matter, was Thomas Atkins. Mr. Atkins is an experienced specialist in civil rights litigation who is admitted into practice in many district courts in the United States, many courts of appeal, the Supreme Judicial Court of Massachusetts, and the United States Supreme Court. From 1975 to 1980, he served as special counsel to the national office of the NAACP for school desegregation, and was in charge of all such litigation nationally from 1977 to 1980. From April 1980 until July 1984, he served as general counsel of the national NAACP and the NAACP Special Contribution Fund. As general counsel, he was responsible for all litigation involving any of the NAACP's 2000 local units, 36 state units, and 7 regional units. He made the decision in 1980 to commit resources of the Special Contribution Fund to this case, and he made the decision to permit the Detroit branch of the NAACP to become a plaintiff. He is an excellent lawyer.

District courts are not restricted to the local market rate in determining the fair market value of an individual attorney's

services. The Court is free to look at the national market or the market in the area of specialization to fairly compensate an attorney.[6] In Mr. Atkins' case, the relevant market is the national market in complex civil rights litigation.

Mr. Atkins' efforts in this case were demonstrably successful. He prevailed in establishing the liability of the City defendants for constitutional violations. He succeeded in establishing that the defendant DPOA failed in its duty of fair representation to black officers who were part of the union. The dollar value of plaintiffs' success can be estimated as at least $28,000,000, figured at the rate of $40,000 an officer in salary and fringe costs for 700 recalled officers.

Mr. Atkins claims that the proper rate for his services should be $200 an hour, plus enhancement. *Moore v. City of Des Moines, Iowa*, No. 82-460 (S.D. Iowa Oct. 25, 1984), aff'd, 766 F.2d 343 (8th Cir. 1985). The Court finds as a matter of fact that $200 an hour is a reasonable fee for Mr. Atkins' services. The question of enhancement will be dealt with *infra*.

Ms. Jeanne Mirer seeks an hourly rate of $125. From 1971 to 1975, she was in private practice in Cambridge, Massachusetts, specializing in civil rights, labor, and constitutional law, and from 1976 to 1982 served as a staff attorney on the Law Reform Unit of the Wayne County Neighborhood Legal Services, specializing in employment law and affirmative action litigation. She has participated in many civil rights cases. Fairly recently, she entered into private practice and does not have a record as a private lawyer with an hourly charge equivalent to the $125 she is claiming.

In an unpublished opinion, *Davis v. Chrysler Corp.*, Civil Action No. 78-71233 (May 26, 1983), Judge Cohn of this court determined that the 1981 report of the Economics of Law Practice Committee of the State Bar of Michigan, 61 Mich. B.J. 118-

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[6] *Louisville Black Police Officers, supra.*

119 (February 1982), reported the 1981 prevailing hourly rate in the Detroit area at $70 an hour. With this figure as a benchmark, he determined that $80 an hour was a reasonable rate, considering the skills and experience of attorney Mirer in that case. It is recognized that there has been some increase in attorney fees generally in this area since 1983 when Judge Cohn made that determination. Considering his determination in 1983, and the normal inflation of legal costs that have come in the last two years, the Court determines that, based upon Ms. Mirer's skill, experience, and background, a reasonable hourly rate for her in this case is $90 an hour.

Michael Barnhart also seeks an hourly rate of $125. He received his J.D. in 1965, and from 1970 until 1973 was an adjunct professor of labor law at the Detroit College of Law. From 1970 to 1982, he worked in the Wayne County Neighborhood Legal Services office handling class action litigation, and from 1972 to 1982 supervised that office. During the period from 1976 to 1982, he was WCNLS Director of Litigation, supervising 36 attorneys, and has had experience in several complex class action lawsuits. In 1982, he went into private practice.

Given the 1981 prevailing rate, as noted in *Davis, supra* in 1983, and allowing for the normal inflation of the last two years, as well as for Mr. Barnhart's skill, experience, and background, a reasonable hourly rate for him in this case is $100 an hour.

James McGinnis claims $100 an hour but states that, because of the complexity of the action, the Court should adjust his base rate to that of $150 an hour. In his deposition, Mr. McGinnis stated that between 1980 and 1984 his hourly rate ranged from $50 to $100, with $75 being the rate most frequently charged. He received his law degree in 1977, and was admitted to practice in 1978. As of July 1, 1980, the approximate beginning of his time claimed in this matter, Mr. McGinnis had tried, to judgment, only one employment discrimination

case, and had not prevailed in that matter. Nor did he successfully try a single employment discrimination case to judgment in the period from July 1, 1980 to December 31, 1984.

Given the 1981 prevailing rate noted in Davis in 1983, the normal inflation of the last two years, and Mr. McGinnis' relative inexperience, a reasonable fee for him is $75 per hour.

Gary Benjamin seeks $100 an hour for his time in the case. He recites in his affidavit that his normal hourly fee is $100 per hour.

This rate is not sustained by his testimony at deposition. He testified that in the case of *Rulo v. Chrysler* and several other cases his clients did not prevail. In *Richards v. IBM*, he was paid something in the range of $3,000 to $5,000 for work on appeal but did not know his hourly realization. In *Young v. Memorial Hospital*, the attorney fee worked out to less than $50 an hour. He also testified that he had taken some cases on a one-third contingency basis, where he had an hourly realization of $100 or more.

Like Mr. McGinnis, Mr. Benjamin was admitted to practice in 1978. Given the 1981 prevailing rate, the normal inflation of the past two years, and Mr. Benjamin's level of experience, the Court determines $75 an hour is a reasonable hourly fee for Mr. Benjamin.

Samuel McCargo and Ronald Reosti have claimed attorney fees for their time spent representing plaintiffs' attorneys in the fee petition. An attorney is entitled to attorney fee petition. *Northcross, supra.* If that attorney hires another attorney to seek the fees on his or her behalf, § 1988 attorney fees are available for the time spent by that attorney.

There is no Sixth Circuit authority on the question, but several courts of appeal have held that an attorney representing the prevailing parties' attorney in a § 1988 fee petition is entitled to fees under the Act.

Opinion

In *Shadis v. Beal*, 703 F.2d 71 (3d Cir. 1983), the attorney in the underlying civil rights case engaged a firm to represent her in her fee petition. The court refused to grant attorney fees to the firm for the time it spent preparing its own fee petition, reasoning that the connection between employment as counsel for the attorney of the prevailing party and the prosecution of a civil rights claim was too attenuated to bring the former within the policy of § 1988. However, the court held that, since the original attorney in the case was entitled to reasonable fees for preparing her own fee petition, the firm which represented her should be compensated in her stead.

In *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984), the court followed the lead of *Shadis*, and found that counsel handling the fee petition should be awarded fees, but only to the extent that he or she stood in the shoes of the original counsel. The court disallowed hours spent by fee petition counsel in familiarizing himself with the case, and hours spent in excessive conferences. The court noted that, since the defendants vigorously litigated the fee application, it was appropriate for original counsel to hire an attorney to represent them in the matter.

In *Jonas v. Stack*, 758 F.2d 567 (11th Cir. 1985), the Eleventh Circuit followed *Shadis* and *Grendel's Den*, reasoning that such a result conforms with the policy considerations underlying § 1988:

> "The Act's primary function is to shift the costs of civil rights litigation from civil rights victims to civil rights violators. *Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1189 (11th Cir. 1983). Its legislative history articulates two justifications for the cost-shifting mechanism. First, the mechanism affords civil rights victims effective access to the courts by making it financially feasible for them to challenge civil rights violations. Second, it provides an incentive for both citizens and members of the bar to act as 'private

attorneys general' to ensure effective enforcement of the civil rights laws.

"We have recognized that the Act's success in achieving its purposes depends on whether the cost-shifting mechanism reimburses costs and fees on a par with what the attorney would otherwise receive from fee-paying clients. (citation omitted). Were we to institute an absolute ban on recovery for expenses incurred by a lawyer who finds it necessary to hire counsel to prosecute his fee application, the profitability of handling civil rights cases would be reduced, since he would then have to absorb an expense not generally associated with other types of litigation."

Id. at 569.

The Court feels it should adopt the reasoning of the First, Third and Eleventh Circuits, and holds that McCargo and Reosti, counsel on the fee petitions before the Court, are entitled to reasonable attorney fees for time spent "standing in the shoes" of the fee petitioners.

Mr. Reosti claims that his rate of compensation should be $150 an hour. He was admitted to the Bar in 1960, and has been in private practice for 16 years, specializing in labor-related litigation, with emphasize on employment discrimination cases. He has authored articles for The Institute of Continuing Legal Education, and has been a guest lecturer at the University of Michigan on the topic of employment discrimination. Given the 1981 prevailing rates, as described in Davis by Judge Cohn in 1983, and considering the normal inflation of the last two years, the Court finds a reasonable rate of compensation for Mr. Reosti is $125 an hour.

Mr. McCargo has suggested no rate of compensation to the Court. He was admitted to practice in 1975, has lectured on labor relations issues, and has served as an arbitrator as well as conducted a private practice. Given the 1981 prevailing rates described by Judge Cohn in Davis in 1983, and considering the

normal inflation, a reasonable rate of compensation for Mr. McCargo would be $80 an hour.

Finally, the question of enhancement of fees must be considered.

Blum v. Stenson, 465 U.S. 886, (1984) is the leading case on the subject of upward adjustments of attorney fee awards in § 1988 cases. *Blum* severely limits the power of the district court to make an upward adjustment in the attorney fee of any civil rights case. The *Blum* Court stated that normally a reasonable fee will be established by multiplying the time reasonably expended by the prevailing market rates in the relevant community, and an upward adjustment would be appropriate only in rare cases:

> "The novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee based on the number of billable hours times reasonable hourly rates. There may be cases, of course, where the experience and special skill of the attorney will require the expenditure of fewer hours than counsel normally would be expected to spend on a particularly novel or complex issue. In those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates. Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award.
>
> "The 'quality of representation,' . . . generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.' " 465 U.S. at , 104 S. Ct. 1541, 1548-49.

Opinion

In *Blum*, the Supreme Court left open the issue of whether an upward adjustment based on the risk of not prevailing, and thereby recovering no fees, is appropriate. Justices Brennan and Marshall separately concurred in *Blum* in order to express their opinions that fees should be enhanced for the risk of not prevailing. Justice Brennan pointed out:

> "I write separately only to reaffirm my view that Congress has clearly indicated that the risk of not prevailing, and therefore the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee.
>
> "Although the Court leaves the question unresolved, . . . the legislative history that always has controlled our interpretation of § 1988, and that proves determinative on the other issues addressed by today's decision, also determines whether an upward adjustment to compensate for the risk of nonpayment may be justified." 465 U.S. at , 104 S. Ct. at 1550.

It therefore appears that the question of upward adjustment, based on the risk of not prevailing and thereby recovering no fees, is an open question in the United States Supreme Court. The Sixth Circuit, however, has specifically ruled that the risk of not prevailing, and thus recovering no fees, is an appropriate basis for upward adjustment. In *Northcross*, *supra*, the court said:

> "This does not mean that the routine hourly rate charged by attorneys is the maximum which can or should be awarded. In many cases that rate is not "reasonable," because it does not take into account special circumstances, such as unusual time constraint, or an unusually unpopular cause, which affect the market value of the services rendered. Perhaps the most significant factor in these cases which at times renders the routine hourly fee unreasonably low is the fact that the award is contingent upon success.... If he or she will only be paid in the event of victory, those rates will be adjusted upward to compensate for the risk the attorney is accepting of not being paid at all."

Id. at 638.

And in *Louisville Black Police Officers, supra*, the court said this:

> "This court stated in *Northcross* that a significant factor which renders a routine hourly fee unusually low is the fact that the award is contingent upon success. We noted that the risk was greatest in cases involving developing areas of law or those in which the facts are strongly disputed.... Both elements were present in this case, thereby supporting 'a substantial upward adjustment to compensate for the risk.'"

Id. at 280.

In *Craik v. Minnesota State University Board*, 738 F.2d 348 (8th Cir. 1984), a post-*Blum* case, the court held that an enhancement of 25% for two of the plaintiffs' attorneys for the risks assumed in taking the case was justified. The Court said:

> "We know from *Blum* that the results obtained by plaintiffs are usually not a proper ground for enhancement (citation omitted). On the other hand, *Blum* leaves open the possibility that the risks assumed by counsel in taking a case can be a ground for enhancement (citation omitted), and we believe that this ground is available here. In *Blum* no enhancement on account of risk was allowed, because the District Court, the court whose fee award was contested in that case, had no basis in the record for finding that any particular risk had been assumed. Here, however, such a finding is compelled. Counsel for plaintiffs undertook this case, which they must have known would require a massive expenditure of time and energy, in the face of the very real possibility that no fee at all would be obtained. The risk here went beyond the normal contingent-fee situation. In Mr. Quiggle's case, for example, substantially all of his professional time between December 1982 and June 1983 was spent on this appeal. The investment of that much time out of one's law practice with no real hope of compensation if

> the appeal should prove unsuccessful is indeed a major risk, one that we think should be taken into account in setting a reasonable fee."

Id. at 350-51.

See also *Roberts v. National Bank of Detroit*, 556 F. Supp. 724 (E.D. Mich. 1983).

This case was a difficult and complex class action that presented novel issues. Plaintiffs achieved excellent results. However, *Blum* prohibits fee enhancement on that basis alone. Attorneys Mirer, McGinnis, Benjamin, and Barnhart were competent and able in their presentation. Attorney Atkins was a superb advocate whose unusually high skills were largely responsible for the results in this case. His extensive experience and background in complex civil rights litigation gave him unusual skills, and he was the lawyer most responsible for bringing about a successful result in what very easily could have been a total disaster for the plaintiffs. Although Mr. Atkins offered representation of an extremely high quality, the Court cannot find that the quality of services rendered was superior to that which one would reasonably expect in light of the $200 an hour rate it finds appropriate for Mr. Atkins.

However, the Court finds that the attorneys in this case faced a substantial risk of failure and non-payment. Notwithstanding that fact, counsel undertook the case and expended large amounts of time and energy in the face of a very real possibility that no fee would be obtained. This is an appropriate basis for upward adjustment, and the Court determines that an upward adjustment of 20% is appropriate in the rate for Mr. Atkins, Ms. Mirer, Mr. McGinnis and Mr. Benjamin. However, this upward adjustment is appropriate only for work that was substantially contingent in nature. Therefore, the upwardly adjusted rate will apply only to those hours worked prior to January 17, 1985, the date of the fee petition hearing. Further, Mr. Barnhart's fee will not be adjusted upward since the minimal

number of hours he spent on the case indicate that his risk of non-payment did not go "beyond the normal contingent-fee situation." Mr. Reosti and Mr. McCargo did not request enhancement, and none will be awarded since they faced no substantial risk of non-payment.

Based on these determinations, the hourly rate of reimbursement for each of the attorneys will be:

	Base Rate	Upward adjustment for Pre-January 17, 1985 Work	Enhanced Hourly Rate Awarded for Pre-January 17, 1985 Work
Mr. Atkins	$200	20%	$240
Ms. Mirer	90	20	108
Mr. McGinnis	75	20	90
Mr. Benjamin	75	20	90
Mr. Barnhart	100	none	100
Mr. Reosti	125	none	125
Mr. McCargo	80	none	80

III

The next question the Court must consider is the number of hours to be attributed to each attorney for the work he or she performed.

Plaintiffs' counsel seek reimbursement for hours spent in trial preparation and in trial. They also seek fees for the hours spent post-trial in proceedings upon the fee petition. The Magistrate has made detailed recommendations as to allowable pretrial and trial hours, and as to fee petition hours up to the first fee petition hearing before this Court on January 17, 1985. The Magistrate made no recommendations as to fee petition hours claimed after January 17, 1985.

Under *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), and its progeny, it is obvious that plaintiffs' attorneys are entitled to reaonsable fees for the time spent on the fee petition.

The Court will first examine the hours claimed, and objected to, before January 17, 1985, upon which the Magistrate made findings and recommendations.

The first question before the Court is whether Jeanne Mirer is entitled to fees for 415.6 hours worked during the period from July 1980 to June 1982. During this time, she was a salaried lawyer with Wayne County Neighborhood Legal Services (WCNLS). Compensation for these hours is claimed by Ms. Mirer personally.

WCNLS has submitted no claim for fees. Ms. Mirer has filed an affidavit stating that WCNLS has assigned to her its rights to fees. Therefore, Ms. Mirer claims, she is entitled to fees for the time she worked for WCNLS.

The Magistrate's Report notes that, although no one raised the issue, the fact that Ms. Mirer was employed by a publicly funded agency would not preclude an award of attorney fees. The Magistrate cited *Leeds v. Watson*, 630 F.2d 674 (9th Cir.

1980), which held that the fact plaintiff's counsel was a publicly funded legal services organization is irrelevant in determining the fee award. This determination of the Magistrate misses the point. It is true that the fact plaintiff's counsel is a publicly-funded legal organization is irrelevant in determining a fee award.[7] The question is not whether WCNLS could petition for fees. The question is whether Ms. Mirer can now receive fees for time spent while she was a full-time salaried employee of WCNLS. It is clear to the Court that this is a legal question subject to de novo review. The City objects to the Magistrate's Report with reference to these fees under *Blum v. Stenson, supra. Blum* held that a reasonable fee is one that is adequate to attract competent counsel, but is not one that would produce a windfall for an attorney. The City argues, in essence, that for Ms. Mirer to receive § 1988 fees for the period of time when she was compensated by her WCNLS salary constitutes a windfall. Ms. Mirer responds that WCNLS was clearly entitled to fees for the time it was involved in the case and she was employed there. She argues that no case restricts WCNLS from assigning its rights to fees to an outside attorney when, because it is unable to handle the case itself, it needs to attract competent counsel to take over the case. Ms. Mirer's affidavit states that, when she left WCNLS, she entered into a contract with WCNLS in which she agreed to continue to represent plaintiffs. In return, WCNLS assigned to her its share of any fee resulting from the time expended by her while in its employ.[8] In essence, she argues that there is no windfall if she receives § 1988 fees for this time because the assignment of § 1988 fees is only what was necessary to attract competent counsel to the case which WCNLS could no longer handle.

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[7] See *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980), *EEOC v. Enterprise Association Steamfitters*; 542 F.2d 579 (2nd Cir. 1976) cert. denied, 430 U.S. 911 (1977); *Shadis v. Beal*, 692 F.2d 924 (3rd Cir. 1982); *Howard v. Phelps*, 443 F. Supp. 374 (E.D. La. 1978).

[8] It is significant that neither the assignment to Ms. Mirer nor the contract between Ms. Mirer and WCNLS was introduced into evidence before the Magistrate or before this Court.

There is no Sixth Circuit authority governing this problem, but in *Shadis v. Beal*, 692 F.2d 924 (3rd Cir. 1982), the court faced a somewhat similar problem. There an attorney employed by the County Legal Services (CLS) when litigation began in 1978 subsequently resigned. CLS retained her on a consultant contract basis and paid her at an hourly rate. CLS further agreed it would not seek fees for the period post-1978. The attorney, in return, promised to reimburse CLS for the amount it paid her on the consulting contract if she won a fee award. CLS sought no fees for this attorney's work after 1978. The district court awarded her fees for the post-1978 period. The Third Circuit affirmed, making it clear that its affirmance depended upon the attorney reimbursing CLS, as called for by her contract.

In *Howard v. Phelps*, 443 F. Supp. 374 (E.D. La. 1978), the court found that the ACLU should receive the fees generated by the attorney's services up to the date he was no longer employed by them, and the attorney should receive fees only for his services rendered after the time he left the ACLU. The court stated:

> "However, it is plain that the organization that employed Mr. Kellogg, the American Civil Liberties Union should receive the fees generated by Mr. Kellogg's services up to the date he was no longer employed by them, Mr. Kellogg to receive fees only for services rendered since July 1, 1977 when he left the services of the ACLU."

Id. at 377.

A similar result was reached in *EEOC v. Enterprise Association Steamfitters*, 542 F.2d 579 (2nd Cir. 1976). There the court said:

> "As the union argues, and the First Circuit held in *Hoitt v. Vitek*, 495 F.2d 219, 220 (1st Cir. 1974), undertaking a non-fee-paying case is the job of a public interest attorney who is salaried principally through federal funding. Certainly any fee recovery will accrue to the funded Project,

> since the individual public interest attorney will not increase his income as the result of the award of fees.

Id. at 593.

And in *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980), the court made clear that the attorney fee award went to the legal services organization which represented the plaintiff in spite of the fact that the order seemed to award it directly to the plaintiffs.

It appears clear to the Court that WCNLS could have petitioned for fees for the time spent by Ms. Mirer in this case while she was employed on the WCNLS staff, and could have recovered them in reasonable amounts. But the fact remains that, for whatever reason, WCNLS has never petitioned for fees.

Ms. Mirer has been fully compensated by salary for the time she spent as an employee of WCNLS. It would be against public policy to award her double compensation, and would provide a windfall for her. In addition, the Court has serious doubt of the right of a legal services organization to assign to a private attorney who leaves its staff the right to fees that belong to the organization. Although there may be no law forbidding a legal services organization from assigning its interest in an attorney fee award, certainly it is against public policy for it to assign a fee award to an attorney formerly in its employ. Such a practice would discourage support of such organizations by the general public.

For the reasons given, the 415.6 hours spent by Mrs. Mirer while working for WCNLS will be deducted from any fee award to her.

The next question to be examined regarding claimed hours is whether fees should be awarded for a total of 106.8 hours spent on proceedings under Rule 37 of the Federal Rules of Civil Procedure. These proceedings arose out of fee claimants' delay in answering the City's March and April, 1982 interrogatories. Defendants were forced to bring several motions to compel

answers to interrogatories, resulting in three orders to compel, before answers were actually provided. In findings 137 to 168, the Magistrate finds as a matter of fact that these hours spent by plaintiffs' attorneys are not reasonably compensable. The findings of the Magistrate are not clearly erroneous. Therefore, the 106.8 hours spent on Rule 37 proceedings, will not be allowed. Of these hours, 5.4 were spent by Mr. Atkins, 48.3 by Ms. Mirer, 36 by Mr. McGinnis, 6 by Mr. Barnhart, and 9.1 by Mr. Benjamin.

The Court must also consider whether fees should be awarded for all of the time spent preparing the fee petition prior to January 17, 1985. Defendants object to the hours they claim were spent reconstructing time records. They also object to specific hours claimed by Ms. Mirer, such as 14 hours for entering and editing data from her private practice time slips into her computer, 5 hours of dictation and proof reading, 8 hours of legal research, 3 hours discussing strategy with clients, and 12.2 hours preparing affidavits drafting the brief and coordinating counsel. Mr. McGinnis claims 11 hours, and Mr. Benjamin claims 12 hours.

In findings 218-224, the Magistrate found that very little of the time above was spent on reconstruction of hours due to lack of contemporaneous records. He found that the 3 hours spent by Ms. Mirer discussing strategy with her clients was not reasonably compensable, and this finding is not clearly erroneous. He also found that all of the other fee petition hours were reasonably compensable, and these findings are not clearly erroneous. Therefore, the hours expended preparing the fee petition will be allowed as claimed, except 3 hours will be deducted from Ms. Mirer for time spent discussing strategy with her clients.

The next question to be considered is whether 111.5 hours spent by Mr. McGinnis when he was engaged as counsel in a separate class action, *Tyson v. City of Detroit*, from September 1, 1980 through August 19, 1982 are compensable. The Magistrate found that the allegations in the *Tyson* case largely tracked

the allegations in this case, with the exception that the *Tyson* plaintiffs claimed to have suffered hiring discrimination, and to have been entitled to retroactive seniority dates. Ultimately, the *Tyson* case was dismissed, without prejudice, on Mr. McGinnis' motion. In findings 27 through 48, the Magistrate found that when *Tyson* was voluntarily dismissed without prejudice, the issues and parties were merged into this case. The Magistrate further found that the *Tyson* case advanced the cause of the laid-off officers in this case, and that, therefore, there was no needless or unproductive effort spent in the *Tyson* case. The Magistrate recommended that Mr. McGinnis be allowed the claimed 111.5 hours for working on that case. The Court finds that the Magistrate's findings are not clearly erroneous on this point. Thus, no deduction will be made for time spent on *Tyson*.

Next, the Court must consider whether to allow fees for 53.6 hours spent by plaintiffs' attorneys in the pursuit of separate claims against the State of Michigan. These claims involved the approval of the 1978 binding arbitration award, setting the terms and conditions of employment of Detroit Police Officers. The claims were dismissed by the Court on February 17, 1982. The Magistrate found that the City could not challenge this time spent on State issues, given its continuing effort to obtain relief from the Court based on the asserted adverse impacts of the arbitrators' awards. The Magistrate recommended that the time spent on claims against the State be compensated, since at trial it was crucial for plaintiffs to understand the financial relationship between the DPOA and the City, and between the arbitration negotiations and the arbitration award. The Magistrate found that hours spent pursuing the claims against the state should not be excluded.

The Court finds that this determination is clearly erroneous. First, the Magistrate's finding that plaintiffs spent most of their time learning essential information about the City and the DPOA is contradicted by his finding No. 128 that plaintiffs spent most of their time on the State claims fighting dismissal.

More importantly, the compensability of time spent pursuing claims against the city is a legal question under *Hensley, supra*. *Hensley* clearly requires that, when a plaintiff presents in one suit completely different claims with different facts and different theories, the separate claims are to be treated as separate lawsuits for fee purposes. Under *Hensley*, the plaintiffs were not prevailing parties against the State. The claims against the State were completely distinct from the other claims in this action. Thus, *Hensley* requires that the 53.6 hours spent pursuing the claims against the State be found not compensable. Of these hours, 35.2 were spent by Ms. Mirer, 15 by Mr. Atkins, and 3.4 by Mr. Benjamin.

Next, the Court must consider whether to reduce the compensable hours for failure to keep contemporaneous time records. Such reductions are approved in *Hensley*. Ms. Mirer claimed 415.6 hours based on reconstructed time records. These hours were the hours worked while she was employed by the WCNLS. Since the Court has already decided that she is not entitled to the hours worked at WCNLS, there is no longer any basis to reduce her hours for failure to keep contemporaneous records.

Mr. Benjamin claims 294.3 hours based on reconstructed rather than contemporaneous records. The Magistrate found that a review of Mr. Benjamin's reconstruction indicates a probable understatement of the time he spent on the case. The Magistrate stated, however, in his report:

> "Because of the lack of contemporaneous time records for some of the hours claimed, Mr. Benjamin has offered a compromise reduction of 30 hours, approximately 10% of those hours not supported by contemporaneous time records. . . . The Court may decide that under these circumstances his proposed compromise is an adequate reduction."

The Court feels that this is a reasonable reduction, and will therefore reduce by 30 the hours allowed Mr. Benjamin.

Next, the Court must consider a number of hours specifically objected to by the defendants.

Opinion

The defendants identified a total of 22.4 hours spent on non-lawyer functions, such as xeroxing and holding press conferences. *Northcross, supra,* has suggested that such time can be compensated, but not at lawyer rates. Before the Magistrate, Mr. Benjamin agreed to withdraw his claim for these hours. The other attorneys agreed to reduce their claimed hours by roughly half of these challenged hours. the Magistrate found this to be reasonable. The Court agrees. Thus, the compensable hours will be reduced as follows: Mr. Benjamin's hours will be reduced by 3, Ms. Mirer's hours will be reduced by 7.5, Mr. Barnhart's hours will be reduced by 1.3, and Mr. McGinnis' hours will be reduced by 1.

Defendants also objected to 46.8 of Mr. Benjamin's and 45.8 of Mr. McGinnis' time as duplicative. The parties agreed to compromise 50% of these hours. Thus, Mr. Benjamin's hours will be reduced by 23.4, and Mr. McGinnis' hours will be reduced by 27.9.

Next, defendants identified 15 hours spent by Mr. Benjamin that they claim are not adequately described. Before the Magistrate, the parties agreed to reduce these claimed hours by one-half. This is reasonable, and the Court will thus reduce Mr. Benjamin's claimed hours by 7.5.

Finally, defendants have requested an across-the-board 10% reduction in compensable hours to account for the fact that there were several ways involved. The Magistrate's report found, except as noted above, all hours were adequately documented and reasonably compensable. In findings 106 and 107, the Magistrate compared the total hours and the fee request here (3,310 for five attorneys) with hours claimed in similar cases before the Eastern District of Michigan. He concluded that plaintiffs were able to try this case successfully to completion in much less time than it had taken other legal teams to try similar complex cases. The Magistrate went on to reject any finding that fee claimants duplicated each other's work. The Magistrate's

finding is not clearly erroneous, and thus an across-the-board reduction of 10% for duplication is not warranted.

The Magistrate found that, other than the hours noted above, all of the hours claimed by petitioners up to the fee hearing on January 17, 1985 were adequately documented and reasonably compensable. This finding is not clearly erroneous, and is adopted by the Court.

Therefore, the compensable hours for each attorney up to the fee hearing on January 17, 1985 can be determined by taking the hours claimed by each attorney and subtracting the hours disallowed in the discussion above. Thus, compensable hours up to January 17, 1985 are:

	Thomas Atkins	Jeanne Mirer	James McGinnis	Michael Barnhart	Gary Benjamin
Hours Claimed	546.4	1471.6	697	46.9	548.7
Hours Worked While Employed as WCNLS attorney		415.6			
Reduction for non-contemporaneous records					30.0
Hours spent in Rule 37 proceedings	5.4	48.3	36	6	9.1
Hours inadequately described					7.5
Hours indentically stated by two attorneys			27.9		23.4
Hours spent discussing strategy with clients re: fee petition		3.0			
Hours spent in non-lawyer functions		7.5	1.0	1.3	3.0
Hours spent pursuing state claims	15.0	35.2			3.4
Total allowable hours up to September 17, 1985 are	526	962	632.1	39.6	472.30

Opinion

Between January 17, 1985 and September 11, 1985, the parties engaged in fee petition hearings before the Magistrate. On September 11, 1985 this Court held a hearing on the fee petition in which the parties argued their objections to the Magistrate's Report and Recommendation. Plaintiffs' attorneys Atkins, Mirer, Benjamin and McGinnis seek hours spent working on the fee petition during this period. In addition, their hired counsel, Mr. McCargo and Mr. Reosti, claim fees for their hours worked on the fee petition. These hours will be allowed as follows: Mr. Atkins, 120.75 hours; Ms. Mirer, 96.7 hours; Mr. McGinnis, 77.45 hours; Mr. Benjamin, 45.8 hours; Mr. Reosti, 151.55; and Mr. McCargo, 77.20 hours. These hours reflect all of the hours claimed, minus hours spent on the appeal. Defendants have raised no meritorious objections to these hours.

Thus, the total hours allowed for each attorney are:

	Pre-January 17, 1985 Reasonable Hours	Hourly Rate Awarded (Enhanced where applicable)	Fee Award Pre-January 17, 1985
Mr. Atkins	526.00	$240	$126,240.00
Ms. Mirer	962.00	108	103,896.00
Mr. McGinnis	632.10	90	56,889.00
Mr. Barnhart	39.60	100	3,960.00
Mr. Benjamin	472.30	90	42,507.00
Mr. McCargo	0.00	00	0.00
Mr. Reosti	0.00	00	0.00

	Post-January 17, 1985 Reasonable Hours	Base Hourly Rate Awarded	Fee Award Post January
Mr. Atkins	120.75	$200.00	$24,150.00
Ms. Mirer	96.70	90.00	8,703.00
Mr. McGinnis	77.45	75.00	5,808.75
Mr. Barnhart	0.0	0.00	0.00
Mr. Benjamin	45.80	75.00	3,435.00
Mr. McCargo	77.20	80.00	6,176.00
Mr. Reosti	151.55	125.00	18,943.75

The total fee award for each attorney for all hours prior to and after January 17, 1985 is as follows:

Mr. Atkins	$150,390.00
Ms. Mirer	112,599.00
Mr. McGinnis	62,697.75
Mr. Barnhart	3,960.00
Mr. Benjamin	45,942.00
Mr. McCargo	6,176.00
Mr. Reosti	18,943.75

These amounts total $500,708.50. It is ordered that the City of Detroit pay one-half of this amount, and the DPOA pay one-half of this amount, for the reasons set forth in this opinion.

IV

In addition to seeking attorney fees, plaintiffs seek costs. 42 U.S.C. § 1988 expressly states that attorney fees: "May be awarded as part of costs." *Northcross, supra*, has recognized that costs are reimbursable. *Northcross* points out that these costs include expenses normally billed to a client, such as photocopying, paralegal expenses, travel and telephone costs, and the like.[9]

a. Paralegals

The first four cost items sought by plaintiffs are paralegal expenses for work performed by Linda Hice-Guastella, Melinda Lepere, Linda Fegins, and Pat Griffin.

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[9] In *Buian v. Baughard*, 687 F.2d 859 (6th Cir. 1982), the court announced that the award of costs to a litigant was an absolute prerequisite to the award of attorneys fees under § 1988 for services resulting from the pursuit of appellate review. *Buian* was overruled by the Sixth Circuit sitting en banc in *Kelly et al. v. Metropolitan Country Board of Education*, Nos. 83-5175, 5243 (6th Cir. September 23, 1985.) There the Court said that an award of costs is separate and distinct from and totally unrelated to an award of attorney fees pursuant to § 1988.

Opinion

The court in *Northcross* summarily indicated that fees for paralegals were recoverable. However, *Northcross* gives no guidance as to how to determine the appropriate amount to award. The question is complex, since the costs of paralegal services contain elements of both costs and attorney's fees. If viewed as attorney fees, the paralegal's time and rate should be scrutinized in the same manner as attorney time and rate. *Ramos v. Lamm*, 713 F.2d 546, 559 (10 Cir. 1983). Presumably, under this method, the amount awarded by the Court to the law firm could exceed the amount the law firm paid to the paralegal. In essence, this is a windfall to the firm.

The First Circuit in *Lamphere v. Brown University*, 610 F.2d 46 (1976), addressed this problem and held that the amount reimbursed must be limited to the amount actually paid. The Magistrate recommended that the Court adopt this approach as the better reasoned method for determining the allowable paralegal reimbursement. The Court agrees. Thus, the amounts claimed as overhead for paralegals will not be allowed. Neither will flat "billing rates" for paralegal time be allowed. Only the amounts actually paid to the paralegals will be recoverable as costs.

Mr. Benjamin filed an affidavit swearing that Linda Hice-Guastella was paid as follows: $8.13 per hour times 248.5 hours, or $2020.30; $8.38 per hour times 2.5 hours, or $20.95, and $1.81 per hour in bonuses and insurance, for a total of $454.31. These three amounts will be allowed. Therefore, plaintiffs will be entitled to recover $2,594.56 for the costs of Linda Hice-Guastella as a paralegal.

With reference to Melinda Lepere, plaintiffs have provided an affidavit stating that she was paid $5.50 an hour for 396 hours (a total of $2,178); $4.50 an hour for 109 hours (a total of $490.50), and fringe benefits of $183.59. This totals $2,852.09. This amount will be allowed as costs.

Law student Pat Griffin was hired by WCNLS exclusively to work on this litigation under the direction of Jeanne Mirer.

The Magistrate found that as a matter of fact all hours worked by Mr. Griffin were in aid of this litigation. Claimants seek reimbursement for the cost of Pat Griffin on behalf of WCNLS. Ms. Mirer's original affidavit states that she agreed to seek this reimbursement for WCNLS, and attached WCNLS's affidavit that it paid Pat Griffin $4.75 per hour for 844 hours, for a cost of $4,009.00. Unlike the situation regarding the claim for fees for Ms. Mirer for the period during which she was on salary at WCNLS, this reimbursement is to WCNLS and not to fee claimants. Therefore, $4,009.00 will be allowed as costs, to be reimbursed by fee claimants to WCNLS.

The Court will not allow any costs for Linda Fegins. Her initial affidavit stated that she was an attorney licensed to practice law, and that her hourly rate for work on the case was $50 an hour. The Magistrate asked for a clarification of whether that amount was an amount billed by Mr. McGinnis for Ms. Fegins' time, or whether that was the amount paid to her. If the latter, the Magistrate recommended full reimbursement for the 29 hours claimed, and if the former, the Magistrate recommended evaluating her rate and time just as for the other attorneys in this case.

No affidavit clarifying Ms. Fagins' compensation was received after the Magistrate's request, and the record is clearly ambiguous as to whether she was paid as a paralegal or billed as an attorney. Because plaintiff's counsel failed to clarify this matter, the Court has no basis on which to award costs for Linda Fegins' time, and will deny any costs for her time.

Therefore, the Court will allow, as costs for paralegals, $2,495.56 for Linda Hice-Guastella, $2,852.09 for Melinda Lepere, and $4,009.00 to WCNLS in repayment of Pat Griffin's wages.

b. Photocopying

Next, the Magistrate found that Mr. McGinnis was entitled to be compensated for $477.82 for photocopying that he did for

DPOA attorney Mr. Nussbaum. Mr. Nussbaum objects that he and Mr. McGinnis had a verbal agreement to set off his copying expense against some copying that the plaintiffs did at the DPOA office. The plaintiffs have not responded to this charge, and the Magistrate's finding must stand as not clearly erroneous. Therefore, $477.82 for photocopying will be awarded to Mr. McGinnis.

c. NAACP Special Contribution Fund (SCF)

Plaintiffs claims as costs $17,428.76 incurred by the NAACP-SCF. The Magistrate found that all items in the NAACP-SCF claim were reasonable and necessary, and hence compensable, except for $284 used by Ms. Mirer to attend the U.S. Supreme Court arguments on the Boston Firefighters' case, and an unspecified amount of double billing for paralegal costs for Ms. Melinda Lepere. The Court agrees that the $284 spent by Ms. Mirer to attend the U.S. Supreme Court arguments in the Boston Firefighters case should not be allowed as costs, and will disallow them. In addition, the Court will disallow $500 for double billing for the paralegal costs of Melinda Lepere. Ms. Mirer's affidavit admits that there was inadvertent double billing, but no one identifies the amount involved, and the Court will therefore set the amount at $500.

The Court finds that, with reference to other claims, the Magistrate's determination is clearly erroneous. The City claims that the parties agreed to eliminate $418.51 in attorney expenses, $12.27 in hotel expenses, and $804.50 in air travel expenses. These agreements are documented in the transcript of the March 5, 1985 hearing before the Magistrate, pp 47-49. Therefore, these amounts will be deducted.

In addition, the City alleges that $134.80 and $113.50 were expenses and costs incurred in connection with the claim against the State. The City claims that the parties agreed to eliminate these expenses if fees were disallowed for time spent pursuing these claims. The Court has already ruled that attorney fees are

not collectable for time spent pursuing the claim against the State. Neither will the Court allow costs, and these amounts will be deducted from the claim.

Finally, the City objects to the expert witness fee for Dr. Joe Darden, claiming that the Court did not credit him in the trial. In the underlying case, the Court said:

> It will disregard the testimony of Dr. Joe Darden, who was hired as an expert for the plaintiff, because his method of calculation was not identical to the method used by Fechter.

NAACP v. DPOA, supra, at 1198 n.4.

The Magistrate determined that, notwithstanding the fact that the Court credited other expert testimony over that of Dr. Darden, that Dr. Darden's testimony was useful in this case, and the Magistrate found the expense to be reasonable, necessary, and compensable.

The Court finds this to be clearly erroneous and will disallow the $1,800 sought to reimburse Dr. Darden. The Court completely discredited his testimony, and his testimony was of no use to the Court in this case.

In summary, the Court will deduct the following figures from the $17,428.17 claimed as costs by the NAACP-SCF:

1. $284 for Ms. Mirer's attendance at the U.S. Supreme Court arguments in the Boston Firefighters case.

2. $500 for double billing for paralegal Melinda Lepere.

3. $418.51 for attorney expenses.

4. $12.27 for hotel expenses.

5. $804.50 for air travel expenses.

6. $134.80 and $113.50 for expenses incurred in connection with the claim against the State.

7. $1,800 expert witness fee for Dr. Darden.

The total deduction is $4,067.58. Therefore, plaintiffs are entitled to $13,360.59 for costs incurred by the NAACP Special Contribution Fund.

d. Expenses Incurred by the Detroit Chapter of the NAACP

The Magistrate found that $596.25 in expenses incurred by the Detroit Chapter of the NAACP were adequately documented and reasonably compensable. The City objects that the parties, in hearing, agreed to reduce this amount by $127.52. However, the City has not documented this agreement in the record before the Magistrate. Therefore, the Court finds that the Magistrate's determination that the expenses incurred by the Detroit Chapter of the NAACP of $596.25 was not clearly erroneous, and therefore will allow this amount in costs.

e. Expenses Incurred by Guardians in the Amount of $1,850

The Magistrate found expenses incurred by The Guardians in the amount of $1,850 to be reasonable, compensable, and adequately documented. There are no objections on the record, and the finding is not clearly erroneous. Therefore, plaintiffs are entitled to costs in the amount of $1,850 for expenses incurred by the Guardians.

f. Expenses Incurred by Focus:HOPE in the Amount of $38,290.50

This claim involves the expert testimony of Dr. Sid Mittra. The Magistrate found this to be reasonably compensable, and found that the testimony aided the Court in its findings. The City objects that the testimony was unproductive at trial, and claims that no more than a $30 a day witness fee can be claimed for this witness. The City based its argument on language in *Northcross, supra*, implying that witness fees are allowed under 28 U.S.C. § 1920. The Court feels that the DPOA is wrong in its interpretation that *Northcross* limits expert witness fees to a

statutory $30 a day. This argument was rejected by Judge Feikens of this Court in *Greenspan v. Automobile Club of Michigan*, 536 F. Supp. 411 (E.D. Mich. 1982), where the court held that expert witness fees are, under *Northcross*, recoverable if they are reasonable and necessary. The Court agrees with Judge Feikens that such fees are recoverable, if they are reasonable and necessary.

This does not close the matter, however, for the Court holds that the Magistrate's finding that this testimony aided the Court is clearly erroneous.

Dr. Mittra testified to the economic damage to the community and the police officers that would come about if they were not reimbursed with a back pay award. Unfortunately, the Court does not feel that that testimony was of any help in determining the issue. The transcript of the testimony, pages 1711 through 1714, puts this testimony in perspective:

> The Court: Let me ask another question that is kind of bothering me here. Lets assume this Court eventually says that all laid-off officers are entitled to all back-pay, and entitled to be made whole, and I make that determination. How do these figures help me here.
>
> What do I do? You have got 50, 81, some 86, 87 million. How does that help me? Where do I put the 81,000,000, 87,000,000?
>
> It seems to me, is this not an individual case, that if this Court should determine back pay was to be awarded, then what would have to happen, it would have to go to a referee or someone and take each individual case and make a determination.
>
> The Witness: That would be the most accurate way to go.
>
> The Court: What would I do with your $87,000,000, if accepted your figures and said we're going to award back pay on all losses, and that comes up to your total of

$87,000,000, and the City, after all appeals, and the City and the DPOA come up with the $87,000,000 and they bring it down and put it in the clerk's office, what do I do with it?

The Witness: My—This is not an accurate statement that I can convey. But my guess would be since, since we had decided to completely ignore all of the out-of-pocket expenses, which in many instances are considerable, that there would be a significant amount of wash between the earned income that they had that they did not report and the out-of-pocket expenses.

The Court: Lets assume that I've got the $87,000,000 sitting in the Clerk's Office, and 799 laid-off officers that are entitled to "X" percentage of that, or "X" share. How do I get that $87,000,000 to 799 officers in any fair way?

What I am saying, sir, is what you have done, is it at all helpful, or are we in a position that, if there is to be that remedy ordered, it has to be done on an individual basis, officer by officer under oath, looking at specifically what he lost, what his income was, and so forth in an individual one-by-one basis?

The Witness: On any kind of a survey that is really not important do that. If you want to be absolutely certain that it is 100% correct—

The Court (interposing) You haven't answered my question. Let's assume it is too much work to be 100% correct. Let's assume that $87,000,000 is the loss, which is what you have established. How would this Court get that in the hands of 799 people fairly? Assume the money is deposited in the Clerk's Office and now there are 799 people standing out there saying, I want my share of that $87,000,000. How do I get that fairly into the hands of the people?

The Witness: The only way you can be fair is simply now to ask each person to document exactly what their loss is.

The Court: Essentially, so we are right back where we started from, that that has to be done at the beginning, doesn't it?

That is the way you get it to any loss before taking the total. I am not trying to depreciate the work, but what use is the fact that you have calculated by your method $50,000,000 in wage loss and $31,000,000 in pension loss, and $5,000,000 in fringe benefit, but how can these figures be of any benefit to the Court, should the Court order the payment of back, of lost wages and fringe benefits when it has to be done on an individual basis, officer by officer?

The Witness: There are two separate issues here. One is to make an overall estimate, a ball park figure of the loss. Another thing is how that lost money is to be distributed.

The Court: You have made the ball park estimate of the loss, $87,000,000.

The Witness: Okay.

The Court: Go ahead. My question is—I guess, I don't want to seem rude. I will ask the question. I will be very coarse in doing it. My question, I guess, is so what?

It therefore appears clear to the Court that the expenses incurred in preparing for Dr. Mittra's testimony and in presenting that testimony were of no benefit to the Court. the fact that $81,000,000 had been lost meant nothing if the Court were to order back pay and fringe benefits. As the Court pointed out in its colloquy with Dr. Mittra, it would then have to allocate that award on an officer-by-officer basis, and the fact that there was $81,000,000 or any other total sum was totally irrelevant.

Therefore, the Court finds the determination of the Magistrate that the testimony aided the Court in its findings to be

clearly erroneous, and will deny the claim for expenses incurred by Focus:HOPE in the amount of $35,290.58.

g. Expenses Incurred by Schrauger & Dunn

The Magistrate recommended payment of $1,363.59 in expenses incurred by Schrauger & Dunn, with the exception of $500 of this expense, which apparently went to Focus:HOPE. No one has responded to this finding of the Magistrate. The court does not find it to be clearly erroneous, and thus the cost to be paid to Schrauger & Dunn is $1,363.59 less $500, or $863.59.

h. Expenses on the Fee Petition

Finally, fee petitioners claim the following expenses on the fee petition: Samuel McCargo, $22.00; Ronald Reosti, $402.48; and Thomas Atkins, $1,633.60. No objections have been made to these sums, and the Court finds they are reasonable and compensable as costs.

Thus, the following costs will be awarded:

Paralegal cost of Linda Hice-Guastella	$ 2,495.56
Paralegal cost of Melinda Lepere	2,852.09
Paralegal cost of Pat Griffin	4,009.00
Photocopying by Mr. McGinnis	477.82
NAACP Special Contribution Fund expenses	13,360.59
NAACP Detroit Chapter expenses	596.25
Guardians expenses	1,850.00
Schrauger & Dunn expenses	863.59
Samuel McCargo's expenses on the fee petition	22.00
Ronald Reosti's expenses on the fee petition	402.48
Thomas Atkins' expenses on the fee petition	1,633.60
Total Costs	$28,562.98

These costs will be shared equally between the City and the DPOA.

V

In sum, the Court awards $400,708.50 in attorney fees. This is the sum of the reasonable fees for Mr. Atkins ($150,390.00), Ms. Mirer ($112,599.00), Mr. McGinnis ($62,697.75), Mr. Barnhart ($3,960.00), Mr. Benjamin ($45,942.00), Mr. McCargo ($6,176.00), and Mr. Reosti ($18,943.75).

The Court further awards $28,562.98 as reasonable costs.

Payment of fees and costs is to be shared equally by the City of Detroit and the Detroit Police Officers Association.

N.A.A.C.P., DETROIT BRANCH; The Guardians, Inc., Brady Bruenton, cynthia Martin, Hilton Napoleon, Sharon Randolph, Betty T. Roland, Grant Battle, Cynthia Cheatom, Evin Fobbs, John Hawkins, Helen Poellnitz, on behalf of themselves and others similarly situated, Plaintiff-Appellees, Cross-Appellants,

v.

DETROIT POLICE OFFICERS ASSOCIATION, Thomas Schneider, Defendants-Appellants, Cross-Appellees, City of Detroit, Coleman A. Young, Mayor of Detroit, Detroit Police Department, and Board of Police Commissioners, Defendants-Appellants 819 F. 2d 1142 (6th Cir. 1987)

Nos. 86-1023, 86-1058, 86-1109

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PRIOR HISTORY

On appeal from the United States District Court for the Eastern District of Michigan.

OPINION

BEFORE: MERRITT, WELLFORD, and NORRIS, Circuit Judges.

Per Curiam.

This controversy involves claims for attorney fees following resolution of racial discrimination claims presented on behalf of black police officers against defendants Detroit Police Officers Association (DPOA), an organization representing police

officers, and the City of Detroit. Fees were sought by various attorneys representing the plaintiffs. We have dealt previously in an opinion by Judge Merritt (filed May , 1987) with the issues on the merits of the appeal arising out of the injunctive order of the district court which precluded layoffs, alleged to be discriminatory in effect, and directed reinstatement of officers previously laid off under a planned reduction in force due to economic and budgetary problems of the City of Detroit, and also ordered certain affirmative relief against DPOA.

There are before us three consolidated appeals from the fee award in controversy; plaintiffs' appeal No. 86-1058; DPOA appeal No. 86-1023; and the City of Detroit appeal No. 86-1109. Fees were awarded in the district court's opinion, dated October 21, 1985, and the subsequently entered judgment on December 6, 1985. Allowance of fees out of the affirmative relief granted by the district court upon application of plaintiffs through their counsel in the district court's decision set out at 591 F. Supp. 1194 (E.D. Mich. 1984). We reversed, holding, in effect, that "approval of a voluntary affirmative action plan [for plaintiffs' benefit] does not create a contract of permanent employment or invalidate or modify a collective bargaining agreement providing for layoffs on a basis of seniority." We held, moreover, that it was error to foreclose bona fide seniority considerations in a layoff situation and that DPOA's failure to bargain against threatened layoffs and the application of seniority in that situation, did not, under the circumstances, constitute a breach of a duty of fair representation to plaintiffs.

It is necessary, therefore, that we set aside the decision of the district court with respect to allowance of fees to the attorneys for plaintiffs. It is required that the plaintiffs prevail before attorney fees may be assessed against defendants, and plaintiffs are no longer prevailing parties. The award of fees is REVERSED accordingly.

Opinion

N.A.A.C.P., DETROIT BRANCH; The Guardians, Inc.; Brady Bruenton; Cynthia Martin; Hilton Napoleon; Sharron Randolph; Betty T. Roland; Grant Battle; Cynthia Cheatom; Evin Fobbs; John Hawkins; Helen Poellnitz, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees (84-1836, 85-1026, 85-1027), Cross-Appellants (85-1041),

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); Thomas Schneider, President of the DPOA; City of Detroit, a Michigan Municipal Corporation; Mayor Coleman A. Young; Detroit Police Department; Board of Police Commissioners; Chief William Hart; Governor William Milliken; and the Michigan Employment Relations Commission, Defendants-Appellants (84-1836, 85-1026, 85-1027), Cross-Appellees (85-1041),

and

Kenneth C. Champagne; Mark Surma; Marsha Dreslinski; Adela Matias-Rivera, et al., Applicants in Intervention-Appellants (85-1027).

Nos. 84-1836, 85-1026, 85-1027 and 85-1041.

United States Court of Appeals,
Sixth Circuit.

Argued Nov. 20, 1986.

Decided June 12, 1987.
Rehearing and Rehearing En Banc
Denied Aug. 31, 1987.

Black Detroit police officers brought action against city, mayor, police department, police commissioner, police chief, and police officers association, alleging that city had violated affirmative duties imposed by previous approval of city's voluntary affirmative action plan, and that association had breached its duty of fair representation. The United States District Court for

the Eastern District of Michigan, Horace W. Gilmore, Jr., 591 F.Supp. 1194, enjoined city from laying off any police officers because layoffs reversed effects of voluntary affirmative action plan, and further found that association had breached its duty of fair representation to black association members. Appeal was taken. The Court of Appeals, Merritt, Circuit Judge, held that: (1) district court erred in concluding that doctrine of collateral estoppel permitted it to modify previously approved voluntary affirmative action plan and prevent city from laying off any police officers as part of planned reduction in force, and (2) under Michigan law, police officers association's failure to act forcefully regarding planned layoffs did not constitute breach of duty of fair representation.

Injunctive orders reversed, case remanded.

1. Judgment—634

Before collateral estoppel may be applied to bar litigation of issue, it must be established that precise issue raised in present case was raised and actually litigated in prior proceedings, that determination of issue must have been necessary to outcome of prior proceeding, that prior proceeding resulted in final judgment on merits, and that party against whom estoppel is sought had full and fair opportunity to litigate issue in prior proceeding.

2. Judgment—715(3)

Although city's institution of voluntary police department affirmative action plan was previously determined to be constitutionally permissible, based on city's own determination that it had discriminated in past, and precluded city from denying fact of prior discrimination, doctrine of collateral estoppel did not thus warrant modification of previously approved voluntary affirmative action plan and foreclose application of bona fide seniority layoff provisions of collective bargaining agreement between police association and city.

3. Labor Relations—52

Public employees of political subdivisions of state are not governed by federal labor law. National Labor Relations Act, § 2(2), as amended, 29 U.S.C.A. § 152(2).

4. Labor Relations—178, 219

City Police officers association's failure to act forcefully in response to city's threatened layoffs of black police officers hired under voluntary affirmative action plan did not constitute breach of association's duty of fair representation; under Michigan law, city's initial decision to lay off officers, as part of planned reduction in force that was permitted under collective bargaining agreement last-hired, first-fired provision, was permissive subject of bargaining, and union had no mandatory duty to act on behalf of its members in response to threatened layoffs.

Walter S. Nussbaum (lead counsel), Mara Kalnins-Ghafari, Donald J. Mooney, Jr., argued, Paxton & Seasongood, Cincinnati, Ohio, Jack F. Fuchs, Farmington Hills, Mich., Frank W. Jackson, Detroit, Mich., Teri L. Hayles, Daniel B. Edelman, argued, Washington, D.C., for defendants-appellants.

Daune Elston, Thomas Atkins, (lead counsel), argued, Brooklyn, N.Y., Jeanne Mirer, Gary Benjamin, James W. McGinnis, Detroit, Mich., for plaintiffs-appellees.

Diane L. Vaksdal, argued, Mountain States Legal Foundation, Denver, Colo., for applicants in intervention-appellants.

Before MERRITT, WELLFORD and NORRIS, Circuit Judges.

MERRITT, Circuit Judge.

Two questions are raised in this case arising from the layoff of black employees hired under an affirmative action plan. The first question is whether prior judicial approval of a public employer's affirmative action plan forecloses that employer from later laying off recently hired employees who would otherwise be

laid off on the basis of seniority under a collective bargaining agreement. This case arises because the City of Detroit laid off 1100 police officers in 1979-80, approximately 75 percent of whom were black. The layoffs occurred under the last-hired, first-fired provision of the City's collective bargaining agreement with the Detroit Police Officers Association.

In *Bratton v. City of Detroit*, this Court upheld a *voluntary* affirmative action plan providing for the promotion of a black sergeant to every second job opening for lieutenant in the police department of the City of Detroit. *See* 704 F.2d 878 (6th Cir.) *(Bratton I)*, *modified*, 712 F.2d 222 (6th Cir.1983) *(Bratton II)*, *aff'g Baker v. City of Detroit*, 504 F.Supp. 841 (E.D.Mich. 1980), *modifying* 483 F.Supp. 930 (E.D. Mich.1979), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984). In that case, although we held that the factual and legal basis for the promotional plan was sufficient to justify the City in adopting the plan *voluntarily*, we specifically and expressly reversed the District Court order which made the plan mandatory. *See Bratton II*, 712 F.2d at 223.

In this case, the District Court, applying the doctrine of collateral estoppel, held that our decision in *Bratton* forecloses further litigation on the issue of prior discrimination in the police department, and leads to the conclusion that the City could not lay off any police officers as part of a planned reduction in force. *See NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. 1194 (E.D.Mich.1984). The net effect of the District Court's order is to mandate that the City may not reduce the staffing and budgetary level of the police department in effect at the time of the order without the prior permission of the court. The District Court enjoined the City from laying off any police officers under the plan because the layoffs reversed the effects of the voluntary affirmative action plan. Based on its collateral estoppel ruling, the District Court ordered reinstatement of all officers previously laid off pursuant to the plan.

Opinion

The City of Detroit and its Mayor, Coleman Young, and the Detroit Police Officers Association appealed the issuance of the injunction preventing any layoffs. The Mayor, the City, and the union argue that the District Court erroneously applied doctrines of estoppel to significantly modify what had previously been a *voluntary* affirmative action plan.

The doctrine of collateral estoppel dictates that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980); *see generally* C. Wright, *Law of Federal Courts* 678-96 (4th ed. 1983).

[1] Before collateral estoppel may be applied to bar litigation of an issue, four specific requirements must be met:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceedings;[1]
>
> (2) determination of the issue must have been necessary to the outcome of the prior proceeding;[2]
>
> (3) the prior proceeding must have resulted in a final judgment on the merits;[3] and

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[1] *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5, 58 L.Ed.2d 552 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.* 402 U.S. 313, 323, 91 S.Ct. 1434, 1439, 28 L.Ed.2d 788 (1971); *United States v Smith*, 730 F.2d 1052, 1057 (6th Cir.1984); *Spilman v Harley*, 656 F.2d 224, 228 (6th Cir.1981).

[2] *See Parklane*, 439 U.S. at 326 n. 5, 99 S.Ct. at 649 n. 5; *Smith*, 730 F.2d at 1057; *Spilman*, 656 F.2d at 228.

[3] *See Blonder-Tongue*, 402 U.S. at 323 91 S.Ct. at 1439; *Smith*, 730 F.2d at 1057.

(4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.[4]

Applying these principles to the facts of this case, it was proper for the District Court to invoke doctrines of estoppel and judicial admission to preclude the City from denying the facts of prior discrimination that it had earlier demonstrated and conceded. *See Baker*, 483 F.Supp. 930 (E.D. Mich.1979). However, it was incorrect for the District Court to then rely on these findings as the sole basis for making a very significant modification to the voluntary plan by disallowing *any* further layoffs until the goals of the plan are met.

[2] In *Bratton*, we merely recognized as a sufficient justification for its voluntary plan the City's *own* determination that it had discriminated in the past. We therefore held that the City's institution of a voluntary affirmative action plan was constitutionally permissible. *See Bratton I*, 704 F.2d at 886-90. This is a different issue from whether a constitutional violation has occurred which mandates a court-ordered remedy. *See Bratton II*, 712 F.2d at 223; *Bratton I*, 704 F.2d at 902 (Merritt, J., dissenting). It was therefore improper for the District Court to rely solely on the *Bratton* findings and conclusions to set aside the reverse seniority provision of the collective bargaining agreement. The constitutional and social policies that permit affirmative action do not mandate it. Such a rule would only lead employers to reject voluntary affirmative action at the outset so as not to compromise their flexibility in the future when reductions in force become necessary.

The court in *Bratton* did not impose a legal duty on the City to hire or retain the particular employees being laid off here. Judicial approval of a voluntary affirmative action plan does not create a contract of permanent employment or invalidate or

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[4] *See Haring v Prosise*, 462 U.S. 306, 313, 103 S.Ct. 2368, 2373, 76 L.Ed.2d 595 (1983); *Allen v McCurry*, 449 U.S. at 95, 101, 101 S.Ct. at 415, 418; *see generally* Restatement (Second) of Judgments § 29 (1982).

modify a collective bargaining agreement providing for layoffs on the basis of seniority. The District Court erred in reading the doctrine of collateral estoppel to modify a previously voluntary affirmative plan and thereby foreclose application of the bona fide seniority layoff provisions of the collective bargaining agreement.

On the second issue presented on appeal, the District Court, in deciding a pendent state claim, held that the Detroit Police Officers Association breached the duty of fair representation it owed to its minority members under Michigan law. This finding was predicated upon the union's "perfunctory and passive" behavior in response to the layoffs at issue in this case. *See NAACP v. DPOA*, 591 F.Supp. at 1219. The Court found that the breach occurred because the union did not fight the layoffs forcefully or effectively. At the outset we should note what the finding was *not* predicated upon: There was no finding of intentional discrimination by the union against its members. The District Court stated that the union had not been found guilty of intentional discrimination, and that its defense of the bona fide seniority provision was not improper. *Id.* The District Court's finding of liability instead stemmed from the union's action "as a whole" in response to the threatened layoffs, not its "defense of any particular position." *Id.* To remedy this alleged breach of the duty of fair representation, the District Court ordered the union to integrate black officers into its leadership structure within one year.

Courts are reluctant to allow the electoral processes of a union to be abridged. In *Donovan v. Illinois Education Ass'n*, the Seventh Circuit struck down a union's *voluntary* plan to allocate a certain percentage of its elected offices to minorities where there had been no finding of prior intentional discrimination by the union. *See* 667 F.2d 638, 640-42 (1982) (applying federal labor laws).

[3] The union is concededly the exclusive bargaining agent under state law for all Detroit police officers below the rank of

sergeant.[5] Public employees of the political subdivisions of a state are not governed by the federal labor laws. *See* 29 U.S.C. § 152(2) (1982). Therefore, the laws of Michigan define the permissible contours of the relationship between the union and its members. *See* Mich.Comp.Laws § 423.201 *et seq.* (1978).

In *Goolsby v. City of Detroit*, 419 Mich. 651, 660-61 n. 5, 358 N.W.2d 856, 861 n. 5 (1984), the Michigan Supreme Court expressly recognized the union's duty of fair representation under the state's labor law. The *Goolsby* Court generally adopted the fair representation standard enunciated by the United States Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Under this analysis, the duty of fair representation is comprised of three distinct responsibilities: "(1) 'to serve the interests of all members without hostility or discrimination toward any', (2) 'to exercise its discretion with complete good faith and honesty', and (3) 'to avoid arbitrary conduct'." *See Goolsby*, 419 Mich. at 664, 358 N.W.2d at 863 (quoting *Vaca*, 386 U.S. at 177, 87 S.Ct. at 909). A union's failure to comply with any one of the three responsibilities constitutes a breach of its duty of fair representation. *Id.*

The general question facing the Court in *Goolsby* has a superficial similarity to the issue facing our Court—absent improper motive, when does a union's unexplained failure to act constitute a breach of its duty of fair representation? In *Goolsby*, the union failed to follow through on grievance proceedings brought on behalf of a group of its members. This failure to further process the grievance was without explanation but there

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[5] The union was granted this authority by the Public Employment Relations Act, Mich.Comp. Laws § 423.211 (1978), which provides in pertinent part:

> Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. . . .

was no evidence of bad faith on the part of the union. The question facing the Court was whether this unexplained failure to act met the third prong of the *Vaca* standard which prohibits arbitrary conduct.

The *Goolsby* Court held that a union's unexplained failure to process the grievances of its members could constitute arbitrary conduct sufficient to meet the third prong of the test. *See* 419 Mich. at 679, 358 N.W.2d at 870. The Court further held that no bad faith on the part of the union was necessary to meet the third prong of the test.

[4] The question presented in this case differs in one significant respect from that presented in *Goolsby*. In our case, the District Court held that the union's failure to act forcefully on behalf of its members in response to threatened layoffs constituted a breach of the duty of fair representation. The union's duty to process grievances on behalf of its members, which was at issue in *Goolsby*, is an essential linchpin of the collective bargaining process. In our case, under Michigan law, a public employer's initial decision to lay off is a permissive subject of bargaining. *Local 1277, AFSCME v. City of Center Line*, 414 Mich. 642, 665, 327 N.W.2d 822, 831-32 (1982). Therefore, the union had no mandatory duty to act on behalf of its members in response to the threatened layoffs.[6] Absent a duty to act, failure to act forcefully does not breach the union's duty of fair representation. *See e.g.* B. Gorman, *Basic Text on Labor Law* 706 (1976).

This does not mean that other circumstances may not arise which would create a duty on the part of the union to bargain against threatened layoffs. For example, if federal or state law prohibited the layoffs, or if the voluntary affirmative action plan or the collective bargaining agreement did not permit the layoffs, then the union may have had a duty to bargain against them. In the context of this case, however, we have held that the District

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[6] The union remains under a duty to bargain over the impact of the layoff decision on workload and safety. *See Center Line*, 414 Mich. at 661-66, 327 N.W.2d at 830-32. None the less, this is not an issue in this case.

Court erred in applying principles of collateral estoppel to create a constitutional obligation on the part of the City to avoid these layoffs. Moreover, the voluntary affirmative action plan did not address layoffs, and the collective bargaining contract between the parties expressly provided for layoffs to be made strictly on the basis of reverse seniority. The District Court specifically found the seniority provision to be bona fide. *NAACP v. DPOA*, 591 F.Supp. at 1219. For these reasons, based upon the facts set forth in the District Court's opinion, the union was under no special obligation to bargain against these layoffs.

The failure to bargain against layoffs could also have been found to be evidence of bad faith or discrimination on the part of the union. However, the District Court did not find that the union was improperly motivated in its reaction to the threatened layoffs. Rather, the District Court held that the union's failure to act *alone* constituted a breach of the duty of fair representation. Absent a finding of intentional discrimination or other improper motivation, the union's mere failure to bargain forcefully enough in a permissible context does not by itself constitute bad faith or discrimination.

The plaintiffs also allege that the union violated 42 U.S.C. § 1981. The District Court did not address this issue. Accordingly, we reverse the District Court's injunctive orders against the City and the union and remand for further proceedings consistent with this opinion.

Opinion

NAACP, DETROIT BRANCH; The Guardians, Inc.; Brady Bruenton; Cynthia Martin; Hilton Napoleon; Sharron Randolph; Betty T. Roland; Grant Battle; Cynthia Cheatom; Evin Fobbs; John Hawkins; Helen Poelinitz, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); Thomas Schneider; President of the DPOA; City of Detroit, a Michigan Municipal Corporation; Mayor Coleman A. Young; Detroit Police Department; Board of Police Commissioners; Chief William Hait, Governor William Milliken; and the Michigan Employment Relations Commission, Defendants.

No. 80-73693-DT.

United States District Court,
E.D. Michigan, S.D.

Jan. 13, 1988.

Black police officers brought action against city and union in which it was alleged that city violated affirmative duties imposed by previous approval of city's voluntary affirmative action plan and that union breached duty of fair representation. The United States District Court for the Eastern District of Michigan, 591 F.Supp. 1194, enjoined city from laying off police officers and found that union had breached duty of fair representation to black members, and appeal was taken. The Court of Appeals, Merritt, Circuit Judge, 821 F.2d 328, reversed and remanded. On remand, the District Court, Gilmore, J., held that: (1) officers could not maintain § 1983 action against union; (2) officers could maintain § 1983 action against city; and (3) union's motion for summary judgment on § 1981 claim was without merit.

Ordered accordingly.

Opinion

1. Civil Rights—13.5(4)

Dismissal of black police officers' § 1983 action against police officers association was required; actions of association did not constitute state action. 42 U.S.C.A. § 1983.

2. Courts—99(1)

Under doctrine of "law of the case," decision on issue of law made at one stage of case becomes binding precedent to be followed in successive stages of same litigation; like stare decisis, it protects against relitigation of settled issues and assures obedience of inferior courts to decision of superior courts.

See publication Words and Phrases for other judicial constructions and definitions.

3. Courts—99(1)

After law of the case is determined by superior court, inferior court lacks authority to depart from it.

4. Limitation of Actions—58(1)

Black police officers' § 1983 action against city was not barred under state's three-year statute of limitations period which governed claims of general injuries to person; findings of fact from prior opinion, concerning events within statute of limitations, provided evidence that race was motivating factor in city's recent actions to lay off black police officers. 42 U.S.C.A. § 1983; M.C.L.A. § 600.5805(8).

5. Courts—99(1)

Black police officers were entitled to maintain § 1981 claim against union despite fact that in original opinion, district court noted that no one had previously brought action against union in which union was found guilty of intentional racial discrimination; court had previously found that union had history of racial hostility and indifference to rights and needs of black officers,

that there was absence of black representation at leadership levels of union, and that union did not respond aggressively to layoffs of black officers. 42 U.S.C.A. § 1981.

6. Civil Rights—13.10

Evidentiary hearing was necessary to determine whether employment discrimination action against city and police union was moot as city allegedly recalled discharged black police officers and majority of membership of union was now made up of minorities.

Thomas Atkins, Brooklyn, N.Y., Barnhart and Mirer by Jeanne Mirer, Gary Benjamin, James W. McGinnis, Detroit, Mich., for plaintiffs.

Walter S. Nussbaum, Farmington Hills, Mich., for defendants Detroit Police Officers Ass'n, David Schneider, President of DPOA.

Frank W. Jackson, Asst. Corp. Counsel, Detroit, Mich., Daniel B. Edelman, Washington, D.C., Terri L. Hayles, Asst. Corp. Counsel, Detroit, Mich., for defendants City of Detroit, Mayor Coleman A. Young, Detroit Police Dept., Bd. of Police Com'rs, Chief William Hart.

OPINION

GILMORE, District Judge.

This matter is before the Court upon remand from the Court of Appeals.[1] Before the Court are two motions; defendant City of Detroit's (City) motion for entry of judgment, and DPOA's motion for summary judgment concerning the 42 U.S.C. §§ 1981 and 1983 claims.

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[1] This Court's original opinion is found at 591 F.Supp. 1194 (E.D.Mich. 1984), and the Court of Appeals' opinion is found at 821 F.2d 328 (6th Cir.1987).

Opinion

For the reasons set forth below, the Court will deny both motions, except for the section 1983 claim against the DPOA. This leaves the Court with the much more difficult question of whether the entire matter is moot. A discussion of that issue is found in part IV of this opinion.

The issue for determination in the City's motion for entry of judgment is whether the Sixth Circuit's mandate forbids any retrial of liability issues and requires the entry of judgment for the City.

[1] With reference to the DPOA, the Sixth Circuit reversed the judgment of this Court finding a breach of the duty of fair representation and remanded it to this Court to address the 42 U.S.C. § 1981 claim. The issue here is whether this Court is foreclosed from considering the section 1981 claim in light of its findings on the breach of the duty of fair representation. The DPOA also seeks summary judgment on the 42 U.S.C. § 1983 claim not addressed by this Court or the Sixth Circuit. The Court grants this summary judgment because the actions of the DPOA do not constitute state action.

I

[2,3] The Court must first consider what authority it has to act under the opinion and mandate of the Sixth Circuit. This requires a consideration of the doctrine of the "law of the case." Under that doctrine, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation. Like stare decisis, it serves the dual purpose of: (1) protection against the re-litigation of settled issues; and (2) assuring the obedience of inferior courts to the decision of superior courts. After the law of the case is determined by a superior court, the inferior court lacks authority to depart from it. *See* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404(1), at 118 (2d ed. 1984) (hereinafter *Moore's*).

According to *Moore's*, the decision of an appellate court on an issue of law becomes the law of the case on remand. "The district court owes obedience to the mandate of the supreme court or the court of appeals, and must carry it into effect according to its terms." *Id.* ¶ 0.404(10), at 170 (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 16 S.Ct. 291, 40 L.Ed. 414 (1895)).

What remains within the power of the district court after remand depends upon the scope of the mandate. When further proceedings are specified in the mandate, the district court is limited to holding such as directed:

> When the remand is general, however, the district court is free to decide anything not foreclosed by the mandate.
>
> In the case of a remand for further proceedings, the mandate constitutes the law of the case only on such issues of law as were actually considered and decided by the appellate court, or necessarily inferred by the disposition on appeal. In the course of subsequent proceedings directed or permitted by the mandate, the district court otherwise will apply the law as it reads it, subject to correction on a second appeal.

Id. at 172-74.

Courts have also held that, upon remand, a trial court may consider "those issues not expressly or implicitly disposed of by the appellate decision." *See, e.g., Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 950 (3d Cir.1985). *See also Quern, v. Jordan*, 440 U.S. 332, 347 n. 18, 99 S.Ct. 1139, 1148 n. 18, 59 L.Ed.2d 358 (1979).

"A trial court is thereby free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not settled by the decision. *Id.*" Moreover, "[t]he mere fact that it could have been decided [by the appeals court] is not sufficient to foreclose

the issue on remand." *Maggard v. O'Connell*, 703 F.2d 1284, 1289 (D.C.Cir.1983).

A general rule has been provided by the Third Circuit in *Bankers Trust, supra:*

> [U]pon a reversal and remand for further consistent proceedings, the case goes back to the trial court and there stands for a new determination of the issues presented as though they had not been determined before, pursuant to the principles of law enunciated in the appellate opinion, which must be taken as the law of the case.

761 R.2d at 950 (citing *United States v. Iriarte*, 166 F.2d 800, 803 (1st Cir.), *cert. denied*, 335 U.S. 816, 69 S.Ct. 36, 93 L.Ed. 371 (1948)).

It therefore becomes essential to consider what was actually considered and disposed of by the Sixth Circuit, or necessarily to be inferred from the disposition.

II

The Sixth Circuit stated that in *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir.) *(Bratton I)*, *modified*, 712 F.2d 222 (6th Cir.1983), *(Bratton II)*, *aff'g Baker v. City of Detroit*, 504 F.Supp. 841 (E.D.Mich.1980), *modifying* 483 F.Supp. 930 (E.D.Mich.1979), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984), it upheld a voluntary affirmative action plan providing for the promotion of a black sergeant to every second job opening for lieutenant in the Detroit Police Department. The court noted that, although it held that the factual and legal basis for the promotional plan was sufficient to justify the City in adopting the plan voluntarily, it "specifically and expressly reversed the District Court order which made the plan mandatory." *NAACP v. DPOA*, 821 F.2d at 330 (citing *Bratton II*, 712 F.2d at 223).

The Sixth Circuit noted that this Court, in applying the doctrine of collateral estoppel, held that the *Bratton* decision

foreclosed further litigation on the issue of prior discrimination in the police department, and "leads to the conclusion that the City could not lay off any police officers as part of a planned reduction in force." 821 F.2d at 330. According to the Sixth Circuit, the "net effect of [this Court's] order is to mandate that the City may not reduce the staffing and budgetary level of the police department in effect at the time of the order without prior permission of the Court." *Id.*

The Sixth Circuit held that this Court properly invoked the doctrine of collateral estoppel to preclude the City from denying the facts of prior discrimination that it had earlier demonstrated and conceded. It held, however, that "it was incorrect for the District Court to then rely upon these findings as the *sole basis* for making a very significant modification to the voluntary plan by disallowing any further layoffs until the goals of the plan are met." *Id.* at 331 (emphasis added). The court stated that in *Bratton* it merely recognized that the City's voluntary affirmative action plan, based on the City's own determination that it had discriminated in the past, was constitutionally permissible, which is "a different issue from whether a constitutional violation has occurred which mandates a court-ordered remedy." *Id.* (citing *Bratton II*, 712 F.2d at 223; *Bratton I*, 704 F.2d at 902).

In sum, the Sixth Circuit stated that this Court erred by relying "solely on the *Bratton* findings and conclusions to set aside the reverse seniority provision of the collective bargaining agreement." *Id.* It was concerned about the impact this decision would have on future employers' decisions to set up voluntary affirmative action plans, and held that judicial approval of a voluntary affirmative action plan does not create a contract of permanent employment, or invalidate or modify a collective bargaining agreement providing for layoffs on the basis of seniority. With reference to the City, the Sixth Circuit merely stated: "[W]e reverse the district court's injunctive orders against the City and the union, and remand for further proceedings consistent with this opinion." 821 F.2d at 333.

Opinion

The Sixth Circuit held that remedial orders of this Court could not be bottomed *solely* on the *Baker/Bratton* findings. Effectively, to allow the voluntary affirmative action program to become mandatory based upon the same evidence that was presented merely to deem the program constitutional would be going too far. It did not find, however, that no evidence of unconstitutional conduct could be presented that could support the imposition of remedial orders by this Court.

In accordance with the general rule of *Bankers Trust, supra*, upon remand a trial court may consider "those issues not expressly or implicitly disposed of by the appellate decision." The trial court must redetermine the issues "presented as though they had not been determined before, pursuant to the principles enunciated in the appellate opinion."

It should be noted that in this case plaintiffs originally brought suit against the City under the Fourteenth Amendment, the Thirteenth Amendment, 42 U.S.C. §§ 1981, 1983, and 1985(3). This Court bottomed its determination of liability on the Fourteenth Amendment, relying primarily upon *Baker/ Bratton*, dismissed the section 1985(3) claim, and did not address the Thirteenth Amendment claim or the sections 1981 and 1983 claims.

It therefore appears that, upon remand based upon the *Bankers Trust* general rule, and considering the narrow and very specific basis of the Sixth Circuit for reversal—namely, this Court's reliance on *Baker/Bratton* as the sole basis for decision—if otherwise applicable and relevant, the Court can consider other claims, providing that consideration is based on something other than the findings and conclusions of *Baker/Bratton*.

It appears, however, that there is no basis for consideration of several of these claims. The Court finds no basis in the record for the Thirteenth Amendment claim and will not consider it. Nor will this Court consider the section 1981 claim because, if there is a claim under the Civil Rights Act, it is based on section 1983 in view of the fact that state action is involved here.

With reference to the Fourteenth Amendment claim, the Court concludes that, in light of *Thomas v. Shipka*, 818 F.2d 496 (6th Cir.1987), plaintiffs may not pursue a Fourteenth Amendment claim. *Thomas* held that, where a plaintiff states a constitutional claim under 42 U.S.C. § 1983, that statute is the exclusive remedy for the alleged constitutional violation, and a direct claim under the Constitution cannot also be asserted. 818 F.2d at 500, 503.

Thomas involved a civil rights action brought by a former employee of the municipal court against the clerk of the court. Plaintiff alleged she had been wrongfully discharged because of her political party affiliations in violation of section 1983 and the First and Fourteenth Amendments. Noting that "[T]he Supreme Court has never recognized a cause of action arising directly under the Constitution in a case where section 1983 was available as a remedy," the Court dismissed the constitutional claim. It concluded: "[I]t is unnecessary and needlessly redundant to apply a cause of action arising directly under the constitution where Congress has already provided a statutory remedy of equal effectiveness through which the plaintiff could have vindicated her constitutional rights." *Id.* at 500.

[4] It thus appears that the present case against the city must be evaluated as a section 1983 action.[2] The city, however,

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[2] This Court recognizes that the Supreme Court has decided cases involving affirmative action and racial discrimination under solely the Fourteenth Amendment, even though the cases theoretically could have been brought under section 1983. *See e.g., United States v. Paradise*, — U.S. —, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (allowed Fourteenth Amendment action in case involving long-standing practice of the Alabama Department of Public Safety of excluding blacks from employment); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2982, 61 L.Ed.2d 666 (1979) (involved racial discrimination by the Columbus Board of Education in which the Court recognized a Fourteenth Amendment cause of action); *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (Court considered Fourteenth Amendment violations due to allegedly racially discriminatory rezoning in the village of Arlington Heights). However,

asserts that such an action is time-barred in light of *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1988, 85 L.Ed.3d 354 (1985).

Wilson held that all claims under section 1983 are governed by the state limitation period applicable to personal injury actions. As applied to claims in Michigan, *Wilson* provides that sections 1981 and 1983 claims will be governed by M.C.L.A. § 600.5805(8), the three year period governing claims of general injuries to the person. *See Garland v. Shapiro*, 579 F.Supp. 858, 859 (E.D. Mich.1984). Hence, asserts the City, given that the suit began in 1980, the section 1983 action is time-barred to the extent that the claim arises from the City's pre-1967 intentional discrimination.

This Court is unwilling to recognize that the section 1983 claim is time-barred. First, assuming that *Thomas* applied and that plaintiffs can now only proceed under section 1983, this Court made specific findings of fact with regards to the City above and beyond the Court's acceptance of the *Baker/Bratton* findings.

This Court found that on December 31, 1978, blacks held 1719 of 4393 positions in the rank of police officer, or 89.1 percent, and 1946 of the total of 5630 positions in the department, or a total of 84.6 percent. "This figure represents the highest percent of blacks ever in the Detroit Police Department." 591 F.Supp. at 1197. On February 23, 1984, when this Court issued its partial summary judgment ruling, the Detroit Police Department had a total sworn personnel of 3762, of which 1007, or 26 percent, were black. It had a total of 2668 police officers, of whom 756, or 28 percent, were black. "Thus, it is clear that the net effect of the layoffs in 1979 and 1980 was to wipe out most of the affirmative action recruiting that had brought large numbers of blacks onto the police force in 1977 and 1978." *Id.*

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because the Sixth Circuit language in *Thomas* is clear, and because plaintiffs could obtain no greater relief under the Fourteenth Amendment than they could under section 1983, this Court will not consider the Fourteenth Amendment claim any further.

This Court also noted the testimony of Dr. Mark Bendick, Jr., an economist who updated the statistical figures established by Allen Fechter in *Baker:*

> Dr. Bendick made a projection for 1988, and indicated that, if the Detroit Police Department had hired blacks in proportion to the labor market representation in all of the years from 1945 to 1978, the presence of black officers in 1988 would be 50.5 percent. As of 1984, blacks comprised 65 percent of the relevant labor market, and the City of Detroit is 67 percent black.

Id. at 1198. Furthermore, Dr. Bendick also testified that the statistical shortfalls of blacks in the Detroit Police Department over the years, up to the early 1970's, could only be explained as the result of racial discrimination. *Id*, at 1200.

"Although in 1978, the year before the layoffs involved in this case took place, 89 percent of Detroit Police Officers were black, the highest percentage ever, blacks still represented a 62.3 percent of the relevant labor market." *Id.* At the time of the 1984 decision, the "percentage of black representation in the ranks of police officers [was] 28.3 percent, and in all ranks 27.9 percent. The relevant labor market in the City of Detroit . . . [was] well over 65 percent." *Id.*

The September 3 letter of Mayor Young to David Watroba (former president of DPOA) shows that "the City knew that it was under a legal mandate to continue its affirmative obligation to plaintiffs, and knew that the layoffs would have a drastic effect upon this obligation." *See* 591 F.Supp. at 1201 (quotes portion of letter).

Moreover, it was obvious from "the testimony and the exhibits that in 1979, and more particularly in 1980, the City made a politically expedient decision that it would rather face a lawsuit by black police officers than face a lawsuit by white police officers." *Id.* at 1202.

With regards to the remedy, this Court found, based on the testimony of Chief William Bracey, former Chief of Patrol of the New York City Police Department "that in addition to the usual losses sustained with the loss of employment, the class of black officers suffered injury as a direct result of the City's past racial discrimination, and its failure in 1979 and 1980 to continue to remedy this discrimination. To put it bluntly—they suffered the trauma of betrayal." *Id.* at 1204.

Numerous police officials testified concerning the impact of the layoffs to the police and the community:

> Although the presence of many black command officers, who were unaffected by the layoffs, somewhat ameliorates this problem, it is undisputed that black patrol officers are the most visible, have the most daily contacts with the community, and are most important in crime prevention and community relations. Therefore, massive reductions in the numbers of black police officers below the rank of sergeant on the street will have dramatic effects.
>
> Thus, the City is in real danger of seeing the gains of the 1970's in terms of police-community cooperation reversed, if the City's unconstitutional layoffs are not remedied.
>
> It is clear from the testimony of Mayor Young and the police experts, Bracey, Hart, Bannon, Murphy, and the exhibits, that the return of black officers to the streets of the City of Detroit is not only necessary to vindicate the constitutional rights of the black police officers, but is also an absolute necessity to restore balance to the community, and the confidence of the community in the Detroit Police Department. Their testimony was intelligent, credible and convincing, and clearly established the need for the return to the force of the black police officers.

Id. at 1206-07.

The City argues, however, that in this case there is no contention that the City acted with racial animus in making the 1979 and 1980 layoffs, and that this Court has specifically found that it did not. Therefore, the City asserts that discriminatory action did not occur within the limitations period. To support this contention, the City quotes the Court's opinion: "This Court does not ascribe racially discriminatory animus to Mayor Young and his administration." 591 F.Supp. at 1202. Even though this Court does not ascribe racial animus to the Mayor and his administration, the fact remains that the Mayor made a conscious choice to face a lawsuit from black officers rather than from white officers, and did effectuate layoffs that drastically reduced the minority representation of the Detroit Police Department well below the proportion of the black population of the City. This Court's earlier findings show that race was a motivating factor in the City's action to layoff black officers:

> However, it is equally obvious from the testimony and exhibits that in 1979, and more particularly in 1980, the City made a politically expedient decision that it would rather face a lawsuit by black police officers than face a lawsuit by white officers. It also decided that it would threaten layoffs of black officers as a club against the DPOA in an attempt to roll back the 1978 Act 312 arbitration award, especially the retroactive pay and COLA increases ordered in the award.

It is not the function of this Court to inquire into the political wisdom of these decisions. However, the Constitution, and particularly the Fourteenth Amendment, exists precisely to insure that the individual and group rights of all individuals, especially minorities, who have been historically shut out of the political process, are protected in the political process.

The rights of the black police officers and black citizens of Detroit to a fully integrated police force were sacrificed in the 1979 and 1980 layoffs. A city does not fulfill its obligations under the Fourteenth Amendment . . . by simply giving the

difficult problem of redressing racial injustice in our society to the federal courts.

Id. at 1202 (footnote omitted).

Thus, even though the Court ascribed no racial animus to the Young administration, the facts are that sufficient findings exist indicating racial discrimination to defeat a motion for entry of judgment. We are not here on a full trial on the issue of violation of section 1983, but only on the question of whether a sufficient factual basis exists to withstand a motion for entry of an order of dismissal.

The findings of fact from this Court's prior opinion provide evidence that race was a motivating factor in the City's actions to layoff the black officers. All of these findings concern events within the statute of limitations that is, events occurring after 1977. Therefore plaintiffs' section 1983 claim is not time-barred, and can be considered under the terms of the mandate of the Sixth Circuit. Additionally, evidence can be presented of events prior to 1977 to the extent that the earlier occurrences impact upon the post-1977 events.

It is therefore clear that the City's motion for entry of judgment must be denied. Plaintiffs have represented they will demonstrate that "wholly apart from ***Baker/Bratton*** the evidence of record . . . dictates a finding that the City's prior unconstitutional behavior was a continuing and proximate cause of the illegal layoffs of 1979 and 1980." Assuming that the issues in this case are not moot, plaintiffs should be given the opportunity to present this evidence.

III

The Court of Appeals disposition with reference to the DPOA was very specific. It reversed this Court's finding that the DPOA breached its duty of fair representation, and said:

> The plaintiffs also allege that the union violated 42 U.S.C. § 1981. The district court did not address this issue. Accordingly, we reverse the district court's injunctive orders against the City and the union, and remand for further proceedings consistent with this opinion.

821 F.2d at 333.

The DPOA contends that all that remains for consideration pursuant to the remand order are the sections 1981 and 1983 claims.[3] As stated in the introduction to this opinion, it is obvious that the section 1983 claim must be dismissed because there is no state action by the DPOA. Therefore, the Court needs only to address the section 1981 claim.

[5] It is the position of the DPOA that, to prevail on the section 1981 claim, the plaintiff must present evidence of defendant's specific discriminatory intent because section 1981 reaches only purposeful discrimination. It argues that, because there was no finding by this Court in its original opinion of intentional discrimination by the DPOA, the Court should grant summary judgment on the section 1981 claim, and dismiss the action against the DPOA.

The Court disagrees. As pointed out by plaintiffs, it is impossible to fairly read this Court's findings concerning the DPOA's history and conduct before, during, and after the 1979 and 1980 layoffs without concluding that the DPOA was indeed

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[3] The plaintiffs originally brought suit against the DPOA based upon the Thirteenth Amendment, 42 U.S.C §§ 1981, 1983, and 1985(3), and a pendent state claim for breach of the duty of fair representation. In its earlier opinion, the Court dismissed the section 1985(3) and the Thirteenth Amendment claims. This Court did not address the section 1983 claim.

guilty of intentional discrimination. This Court made five major findings in its opinion.

It first found a history of racial hostility and indifference to the rights and needs of black officers. "Witness after witness, all black and all police officers or sergeants, testified to the discriminatory manner in which they were treated by the DPOA." 591 F.Supp. at 1213.

Second, the Court found a total absence of black representation at the leadership levels of the DPOA. As of the time of this Court's opinion in 1984, no black had ever been elected to one of the top officer positions, only two blacks had served on the executive board, and no black member had ever served on the negotiating committee. This Court specifically rejected the DPOA's reason for not putting blacks on this committee, namely that there were not sufficient "trustworthy" blacks to fill the positions using the union's criteria of political patronage. 591 F.Supp. at 1214.

Third, through the recitation of the negotiating history, the Court established the perfunctory behavior on the part of the DPOA when the City eliminated one-half of the blacks from the force. This Court in its earlier opinion clearly questioned why the union responded in a totally routine manner to the layoffs of one-quarter of the DPOA members at a dramatic loss of overall dues income to the union. 591 F.Supp. 1214-18.

Fourth, the Court noted the DPOA's present-day failure in 1984 to make any serious efforts to assist the black officers. It stated:

> The actual fact is that the union, even in its 1983 demands, evinced no real interest in getting black laid-off police officers back to work. Again, given the DPOA's history, this Court cannot believe that this behavior would be the same if one-half of its white membership was laid off.

591 F.Supp. at 1218.

Finally, this Court noted the DPOA's history of concessions and prompt union action to avert layoffs in 1975 and 1981, when the jobs of white officers were at stake. Comparing these layoffs with the 1979 and 1980 layoffs of the black officers, this Court noted that, in the layoffs of the white officers, the DPOA did something, whereas with the black officers it did nothing. The Court concluded by stating:

> Thus, this Court is not concerned with any reasonable activity of the DPOA in collective bargaining, even certain activity which sacrifices the interests of minorities for the majority. This Court is only concerned with activity that is arbitrary, *racially discriminatory*, and not in good faith. And this Court finds that, in its representation of its black members, the DPOA's perfunctory and passive behavior in 1979 and 1980 breached the duty of fair representation.

591 F.Supp. at 1219 (emphasis added).

These findings contradict the DPOA's assertion that the court found as a matter of fact that there had been no discrimination in the layoff negotiations.

Furthermore, this Court's findings with respect to the violation of the duty of fair representation were tantamount to a finding of intentional discrimination under 42 U.S.C. § 1981 when it awarded attorney fees and costs against the DPOA. *See NAACP v. DPOA*, 620 F.Supp. 1173 (E.D.Mich.1985), *rev'd*, 819 F.2d 1142 (6th Cir. 1987). In granting attorney fees to plaintiff's attorneys, this Court held:

> The Court did not reach plaintiff's claim under § 1981 because that claim was mooted by the finding of the breach of duty of fair representation. Plaintiff's § 1981 claim and duty of fair representation claim arose out of a common nucleus of operative facts, i.e. the DPOA's action *as a whole* with regard to the 1979 and 1980 layoffs of black officers.

Id. at 1180 (emphasis in original).

Furthermore, this Court cannot overlook the recent Supreme Court case of *Goodman v. Lukens Steel Co.*,—U.S.—, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987), decided a week after the Sixth Circuit issued its opinion in this case. This opinion also favors denial of the DPOA's motion for summary judgment. At issue in *Lukens* were findings of racial discrimination and harassment by Lukens Steel against its black employees, and findings that the union had correspondingly failed to comply with the statutory and contractual duties to defend its black members in challenging the company's discriminatory practices. The union was found not guilty of having racial animus against blacks generally, but those acts of omissions which were racially motivated were found to violate section 1981 in much the same way as racially motivated or racially charged acts of commission:

> As we understand it, there was no suggestions below that the unions held any racial animus against or denigrated blacks generally. Rather, it was held that a collective bargaining agent could not, without violating Title VII and section 1981, follow a policy of refusing to file grievable racial discrimination claims however strong they might be and however sure the agent was that the employer was discriminating against blacks. The unions, in effect, categorized racial grievances as unworthy of pursuit and, while pursuing thousands of other legitimate grievances, ignored racial discrimination claims on behalf of blacks, knowing that the employer was discriminating in violation of the contract. Such conduct, the courts below concluded, intentionally discriminated against blacks for seeking a remedy for disparate treatment based on their race, and violated both Title VII and section 1981. As the district court said, "a union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title VII and section 1981, regardless of whether, as a subjective matter, its leaders were favorably

> disposed towards minorities." 580 F.Supp. [1114] at 1160 [ED Pa.1984].
>
> The courts below, in our view, properly construed and applied Title VII and section 1981. Those provisions do not permit a union to refuse to file any and all grievances presented by a black person on the ground that the employer looks with disfavor on and resents such grievances. It is no less violative of these laws for a union to pursue a policy of rejecting disparate treatment grievances presented by blacks because the claims assert racial bias and would be very troublesome to process.

Id.,—U.S. at —, 107 S. Ct. at 2625, 96 L.Ed.2d at 586-87.

Because the central premise of the DPOA motion, that this Court did not find intentional discrimination by the DPOA in its earlier opinion, is erroneous, the DPOA's motion for summary judgment under section 1981 must be denied. In its earlier opinion, this Court did not rule that no intentional discrimination occurred, only that nobody previously brought a lawsuit against the DPOA, or that involved the DPOA, in which the DPOA was found guilty of intentional racial discrimination. This does not mean that the DPOA had not discriminated in the past, nor does it mean that the DPOA did not intentionally discriminate against blacks with respect to the layoff negotiations in 1979 and 1980.

It is true that the Sixth Circuit stated that this Court did not make a specific and explicit finding of intentional discrimination, but it did not state this Court did not make findings that could rise to the level of intentional discrimination. The Sixth Circuit seems to suggest that enough evidence existed to make the finding of intentional discrimination, yet it had to recognize that the Court did not make its ruling based on that explicit finding.

It is clear that abundant evidence exists in this Court's 1984 decision regarding the DPOA's intentional discrimination. Because this Court did not bottom its decision on this basis, the Sixth Circuit felt compelled to reverse. This does not mean that evidence of intentional discrimination does not exist.

For the foregoing reasons, the motion for summary judgment on section 1981 will be denied, and the motion on section 1983 will be granted.

IV

This Court thus finds that the City's motion to dismiss the section 1983 claim and the DPOA's motion for summary judgment on the section 1981 claim are without merit. Nevertheless, the Court must consider a more serious question—that of mootness. Defendants have represented to the Court that the remedies ordered in its prior judgment against the City of Detroit have been complied with in that the City has recalled all of the discharged black police officers, and has hired additional black officers to the Detroit Police Department. With reference to the DPOA, defendants have represented that a majority of the membership of the DPOA is now made up of minorities and that, therefore, any order requiring minority representation at the various levels of the DPOA is moot, in that minorities, through intra-union political action, can protect themselves.

[6] These issues are of great concern to the Court. First, there are factual issues that must be determined. The representations made to the Court by counsel do not constitute a factual determination unless there can be a stipulation of facts by all sides. Secondly, the legal import of these facts, if they are established, is also of significance. If they are established, does that preclude this Court's jurisdiction under Article III under which the Court may consider only an actual case or controversy? To resolve these issues, the Court will schedule a hearing for the purpose of establishing a factual basis, and for dealing with the legal issues involved if the facts as alleged are true.

A hearing on the factual issues as to mootness and the legal effect thereof will be held on Wednesday, February 17, 1988, at 2:00 p.m. Plaintiffs' brief shall be filed by February 1, 1988. Responsive briefs shall be filed by February 12, 1988.

An order in compliance herewith may be presented.

Opinion

NAACP, DETROIT BRANCH; The Guardians, Inc.; Brady Bruenton; Cynthia Martin; Hilton Napoleon; Sharron Randolph; Betty T. Roland; Grant Battle; Cynthia Cheatom; Evin Fobbe; John Hawkins; Helen Poelinitz, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); Thomas Schneider, President of the DPOA; City of Detroit, a Michigan Municipal Corporation, Mayor Coleman A. Young; Detroit, Police Department; Board of Police Commissioners; Chief William Hart; Governor William Milliken; and The Michigan Employment Relations Commission, Defendants.

No. 80-73693-DT.

United States District Court,
E.D. Michigan, S.D.

June 15, 1988.

Court raised issue of mootness in civil rights action that had been brought against city and city police association. The District Court, Gilmore, J., held that the action was moot as to both city and association.

Action dismissed.

1. Federal Courts—13.10

Civil rights action brought against city was moot, where all officers that court had ordered recalled were recalled and had been given their full seniority rights under contract between police association and city, seniority rights of recalled officers were fully protected under collective bargaining agreement, there was no showing that seniority rights of any recalled officer had ever actually been threatened, and recalled officers would have clear remedy under contract grievance procedure if such rights were threatened, and accordingly, plaintiffs were not

entitled to entry of consent decree accepting seniority list published by city as contractually binding on status of recalled officers. 42 U.S.C.A. § 1983; U.S.C.A. Const. Art. 3, § 1 et seq.

2. Federal Courts—13.10

Civil rights action was moot as to city police association; court's principal concern at time of its earlier opinions was that black members of association be given their proper representation in leadership structure so that they could protect their rights at time when black members were the minority, but since time of earlier opinion, racial composition of city police department had changed, and majority of association membership was made up of blacks and other minorities. 42 U.S.C.A. §§ 1981, 1983; U.S.C.A. Const. Art. 3, § 1 et seq.

Walter S. Nussbaum, Farmington Hills, Mich., on behalf of defendants Detroit Police Officers Ass'n David Schneider, President of DPOA.

Frank W. Jackson, Asst. Corp. Counsel, Detroit, Mich., Daniel B. Edelman, Washington, D.C., Terri L. Hayles, Asst. Corp. Counsel, Detroit, Mich., on behalf of defendants City of Detroit, Mayor Coleman A. Young, Detroit Police Dept., Bd. of Police Com'rs and Chief William Hart.

Thomas Atkins, Brooklyn, N.Y., Barnhart and Mirer by Jeanne Mirer, James W. McGinnis, Detroit, Mich., on behalf of plaintiffs.

OPINION

GILMORE, District Judge.

In its most recent opinion in this case,[1] this Court held, on remand from the Court of Appeals, 821 F.2d 328, that plaintiff

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[1] *See NAACP v. DPOA*, 676 F.Supp. 790 (E.D. Mich.1988).

could maintain an action under 42 U.S.C. § 1983 against defendant City of Detroit (City), and that the defendant Detroit Police Officers Association's (DPOA) motion for summary judgment on a claim under 42 U.S.C. § 1981 was without merit. The Court, however, raised the question of mootness, and ordered a further hearing to determine whether the case is moot so as to preclude this Court's jurisdiction under Article III because of the lack of an actual case or controversy.[2]

I

The remand hearing ordered by the Court in its opinion of January 13, 1988[3] was held on May 4, 1988. At that hearing, all parties stipulated that there has been a full recall, or an offer of recall, with protection of full seniority, for all officers laid off in 1979 and 1980. Thus, there has been full compliance with this Court's order contained in its earlier opinion.[4]

It was also stipulated by all parties that, as of February 17, 1988, 51.3 percent of the membership of the DPOA was black, and that, in addition, there were 64 other members of the DPOA who were in a protected class. The parties further stipulated that 70 per cent of all new officers hired after all of those ordered returned to the police force by this Court's previous order were black. In addition, it was agreed that the City had hired 1,290 officers hired subsequent to the completion of the recall in June 1985.

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[2] There is no claim for damages against either the City or the DPOA under §§ 1981 or 1983. The only relief sought in this case on remand from the Court of Appeals is injunctive relief.

[3] *See* 676 F.Supp. at 799.

[4] The Court's earlier opinion on this matter is found at 591 F.Supp.1194 (E.D.Mich.1984).

II

In making a determination as to whether or not the case is presently moot, this Court must consider whether there has been full compliance with this Court's order contained in its earlier opinion.[5] With reference to the City, the question is whether all of the officers laid off in 1979 and 1980 have been offered recall, and whether the racial composition of the police force is now equivalent to the relevant labor market. The only part of this Court's order that remained pending against the City prior to the action of the Court of Appeals[6] reversing and remanding this case was an order requiring this Court's approval before the lay-off, suspension, or discharge of any police officer, except for disciplinary reasons. With reference to the DPOA, this Court's prior order required reasonable representation of blacks in the leadership structure of the DPOA within 12 months. The Court's specific concern with reference to the DPOA was that "[B]lack members of the DPOA are given their proper representation in the leadership structure of the DPOA, [so] they can, in the future, protect minority members against a breach of the duty of fair representation by the Union. It is this goal that this Court seeks." 591 F.Supp. at 1220.

III

The concept of mootness goes to the fundamental idea that Article III courts may decide only actual "cases or controversies." As the Supreme Court stated in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1987):

> A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties

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[5] 591 F.Supp. at 1220-21.

[6] *NAACP v. DPOA*, 821 F.2d 328 (6th Cir.1987).

> having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Id. at 240-41, 57 S.Ct. at 464 (citations omitted).

A case can become moot because the law has changed,[7] because a defendant has paid monies owed and no longer wants to appeal,[8] because the allegedly wrongful behavior has passed, been mooted, or could not be reasonably expected to occur.[9]

The Supreme Court has created various exceptions to the rule to prevent either party from creating a technical mootness as a sham to deprive the Court of jurisdiction. For example, if a party voluntarily stops allegedly illegal conduct, that change does not necessarily make the case moot, for the defendant would then be free to return to his old ways. Defendant must show that "there is no reasonable expectation that the wrong will be repeated." *U.S. v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953) (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945)).

Another exception is the "capable of repetition yet evading review" doctrine. A mere "physical or theoretical possibility" is not enough to meet this test, otherwise "virtually any matter of short duration would be reviewable." There must be a "reasonable expectation" or a "demonstrable possibility" that "the same controversy will reoccur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 1183-84, 71 L.Ed.2d 353 (1982).

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[7] *See, e.g., United States v. Alaska S.S. Co.*, 253 U.S. 113, 40 S.Ct. 448, 64 L.Ed. 808 (1920).

[8] *See, e.g., California v. San Pablo & Tulore R.R.*, 149 U.S. 308, 313-14, 13 S.Ct. 876, 878, 37 L.Ed. 747 (1893).

[9] *See, e.g., SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 406, 92 S.Ct. 577, 579, 30 L.Ed.2d 560 (1972).

The Sixth Circuit recently dealt with mootness in *Berry v. School District of the City of Benton Harbor*, 801 F.2d 872 (6th Cir. 1986). In *Berry*, the court held moot a claim for injunctive relief governing layoffs where no actual layoff was contemplated. The court pointed out that "[w]ithout knowing the facts of the particular layoff situation, it did not have a case of controversy with the immediacy necessary for an informed decision." 801 F.2d at 875.[10]

IV

Applying the law set forth above to the facts of the instant case, the Court concludes that the controversy truly is moot, and the Court must therefore dismiss the case.

[1] With reference to the City of Detroit, plaintiff concedes that all officers ordered to be recalled have been recalled, and have been given their full seniority rights under the contract between the DPOA and the City. The seniority rights of recalled officers are fully protected under the collective bargaining agreement, and there is no showing that the seniority rights of any recalled officer has ever actually been threatened. If such rights were threatened, the recalled officers would have a clear remedy under the contract grievance procedure.

Nonetheless, plaintiffs sought an agreement from defendants with reference to the rights of recalled officers, and the entry of a consent decree. The proposed agreement is as follows:

> As represented to the Court at the May 4, 1988 hearing herein, the parties consider the unchallenged seniority list published by the City of Detroit, on which seniority is based on the date of initial hire as contractually binding as to the status of the recalled officers, notwithstanding any legal rights the parties might otherwise have.

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[10] For other cases discussing mootness, see *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975); and *Spear v. City of Oregon*, 847 F.2d 310 (6th Cir.1983).

Opinion

> As shown by the signature of their counsel below, the Court may consider this agreement to be the intent of the parties, and may enter same as a consent decree herein.

The City refused to agree to the entry of any proposed consent decree, but argues that the case should be dismissed as moot.

The Court agrees with the City. Everything the Court sought to accomplish in its original judgment in the within matter has been accomplished. All officers laid off in 1979 and 1980 have been recalled. All of these officers have been given full seniority rights, which are protected under the collective bargaining agreement. Therefore, it appears there is no case or controversy remaining with the City, and the matter is moot as to the City.

[2] With reference to the DPOA, the Court also finds the case to be moot. The Court's principal concern at the time of its original opinions was that black members of the DPOA be given their proper representation in the leadership structure so they can protect their rights. At that time, the black members were a minority, and there was a clear indication that the rights of many of the black officers were not being protected by the white majority.

Since the time of this Court's opinion in 1984, however, the racial composition of the Detroit Police Department has changed. Presently, blacks constitute 51.3 percent of the Department and 70 percent of new hires. In view of the fact that the majority of the membership of the DPOA is now made up of blacks and other minorities, they are able to protect themselves through intra-union political action against actions of white officers that would deprive them of fair representation or rights under 42 U.S.C. § 1981. This being so, there remains no controversy between the NAACP and the DPOA, and the matter is moot.

For the reasons stated, appropriate orders may be entered dismissing the entire action.

Opinion

N.A.A.C.P., DETROIT BRANCH; The Guardians, Inc.; Brady Bruenton; Cynthia Martin; Hilton Napoleon; Sharon Randolph; Betty T. Roland; Grant Battle; Cynthia Cheatom; Evin Fobbs; John Hawkins; Helen Poelinitz; on behalf of themselves and others similarly situated, Plaintiffs,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); Thomas Schneider, President of the DPOA; City of Detroit, a Michigan Municipal Corporation; Mayor Coleman A. Young; Detroit Police Department; Board of Police Commissioners; Chief William Hart; Governor William Milliken; and The Michigan Employment Relations Commission, Defendants.

No. 80-73693

United States District Court for
the Eastern District of Michigan, Southern Division

696 F. Supp. 1145; 1988 U.S. Dist. LEXIS 11305; 48 Fair Empl. Prac. Cas. (BNA) 61; 49 Empl. Prac. Dec. (CCH) P38,864

October 11, 1988, Decided

COUNSEL

Thomas Atkins, Esq. Brooklyn, NY, Barnhart and Mirer, By: Jeanne Mirer, Esq., Detroit, MI, James W. McGinnis, Esq., Detroit, MI, On behalf of plaintiffs

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Frank W. Jackson, Esq., Assistant Corporation Counsel, Detroit, MI, Daniel B. Edelman, Esq., Washington, D.C., Terri L. Hayles, Esq., Assistant Corporation Counsel, Detroit, MI, On behalf of defendants, City of Detroit, Mayor Coleman A. Young, Detroit Police Department, Board of Police Comissioners, Chief William Hart

OPINION

Horace W. Gilmore, United States District Judge

Absent action by the Court of Appeals,[1] with this opinion, this Court closes the books on this long-going litigation that commenced in 1980.

Before the Court is a motion by Plaintiffs seeking a determination that they are entitled to reinstatement of an award of fees made by this Court in 1985,[2] interest on that award, and a further award of fees for work done from the time of the District Court's award to the present.

In making the award in 1985, the Court directed the payment of some $400,708.50 in attorney fees to Plaintiffs' attorneys. It further ordered that the City of Detroit pay one-half of that amount and the DPOA pay one-half of that amount, for the reasons set forth in the opinion.[3] The history of this case is set forth well in previously published opinions. In *NAACP v. DPOA*, 591 F. Supp. 1194 (E.D. Mich. 1984), this Court found that the City breached its affirmative and constitutionally mandated duty to remedy past potential racial discrimination in the Detroit Police Department, and directed the rehiring of black and white police officers laid off in 1979 and 1980. It further held that the breach of the City was knowing and intentional, and that the DPOA breached its duty of fair representation. The award of fees previously discussed followed in *NAACP v. DPOA*, 620 F. Supp. 1173 (E.D. Mich. 1985).

In *NAACP v. DPOA*, 821 F.2d 328 (6th Cir. 1987), the Court of Appeals reversed and remanded the case. On the same day, in *NAACP v. DPOA*, the Sixth Circuit, in an unpublished

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[1] See *infra* p. 13.

[2] *NAACP v. DPOA*, 620 F. Supp. 1173 (E.D. Mich. 1985).

[3] See *NAACP v. DPOA*, 620 F. Supp. at 1194.

opinion, reversed the grant of fees previously made by this Court.[4]

In *NAACP v. DPOA*, 676 F. Supp. 790 (E.D. Mich. 1988), this Court held that, in light of the language of the Court of Appeals in its remand, the Plaintiffs could maintain a § 1983 action against the City, and that the Union's motion for summary judgment on the § 1981 action was without merit. The Court also raised the question in that opinion of whether the entire case was moot. The Court said:

> "Defendants have represented to the Court that the remedies ordered in its prior judgment against the City of Detroit have been complied with in that the City has recalled all of the discharged black officers, and has hired additional black officers to the Detroit Police Department. With reference to the DPOA, defendants have represented that a majority of the membership of the DPOA is now made up of minorities, and that, therefore, any order requiring minority representation at the various levels of the DPOA is moot, in that minorities, through intra-union political action, can protect themselves."

Id. at 799.

The Court then directed that a factual hearing be held on the question of mootness, and that legal briefing follow.

Subsequently, the hearing ordered was held, and in *NAACP v. DPOA*, 685 F. Supp. 1004 (E.D. Mich. 1988), the Court held that the action was moot as to both the City and the DPOA. The Court said:

> "With reference to the City of Detroit, plaintiff concedes that all officers ordered to be recalled have been recalled, and have been given their full seniority rights under the contract between the DPOA and the City. . . .
>
> "Everthing the Court sought to accomplish in its original judgment in the within matter has been accomplished.

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[4] 819 F.2d 1142 (6th Cir. 1987).

> All officers laid off in 1979 and 1980 have been recalled. All of these officers have been given full seniority rights, which are protected under the collective bargaining agreement. Therefore, it appears there is no case or controversy remaining with the City, and the matter is moot as to the City.
>
> "With reference to the DPOA, the Court also finds the case to be moot. . . .
>
> "Since the time of this Court's opinion in 1984, however, the racial composition of the Detroit Police Department has changed. Presently, blacks constitute 51.3 percent of the Department and 70 percent of new hires. In view of the fact that the majority of the membership of the DPOA is [*5] now made up of blacks and other minorities, they are able to protect themselves through intra-union political action against actions of white offices that would deprive them of fair representation or rights under 42 U.S.C. § 1981. This being so, there remains no controversy between the NAACP and the DPOA, and the matter is moot."

Id. at 1007.

It is now Plaintiffs' position that, as long as it has by suit obtained a significant portion of the desired goal, it may be declared a prevailing party, even if later events moot the claim. See *Crowell v. Mader*, 444 U.S. 505 (1980); *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980), cert. denied, 450 U.S. 1012 (1981). Plaintiffs assert additionally that their claims for attorney fees survive "independently under the court's equitable jurisdiction, even though the underlying case has become moot." See *Reifer v. Del Monte Properties*, 605 F.2d 1135 (9th Cir. 1979).

Plaintiffs assert that through their efforts an order was obtained that extended the right of recall to 1,000 black and white police officers. They point out that all officers ordered returned by this Court were returned to their positions in the Detroit Police Department prior to the reversal and remand of the case by the Sixth Circuit. They also assert that this litigation and this Court's order were "the catalyst to the contractual

change to recognize and protect the seniority ordered by the Court, which the Court in its June 15 opinion[5] found to be in existence, estopping the parties from later denying it."

With reference to the DPOA's claim that no fees were due, Plaintiffs assert that through this lawsuit blacks and other minorities have become the majority force in the DPOA, and, therefore, are able to protect their rights through intra-union political activity.

Plaintiffs also note that this Court, in its opinion of January 13, 1988, refused to grant the City's Motion for Entry of Judgment, and the DPOA's Motion for Summary Judgment. In denying the City's motion, the Court stated:

> "The findings of fact from this Court's prior opinion provide evidence that race was a motivating factor in the City's actions to lay off the black police officers."

676 F. Supp. at 796.

Regarding the DPOA's Motion for Summary Judgment of the section 1981 claim, the Court stated:

> "[I]t is impossible to fairly read this Court's findings concerning the DPOA's history and conduct before, during, and after the 1979 and 1980 layoffs without concluding that the DPOA was indeed guilty of intentional discrimination."

Id. at 796-97.

Plaintiffs suggest these statements indicate that, if the case had not been deemed moot, the Plaintiffs would have succeeded on the merits.

Plaintiffs further note that the Sixth Circuit recently reiterated the standards for awarding fees even when there is no judgment in plaintiff's favor. In *Loudermill v. Cleveland Board of Education*, 844 F.2d 304 (6th Cir. 1988), the court said:

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[5] 685 F. Supp. 1004 (E.D. Mich. 1988).

> "When a court is asked to award attorney fees in a civil rights case, the determinative issue is whether the applicant is the "prevailing party" in the action. This is the only standard contained in . . . the [governing] statute . . . . Decisions under § 1988 have made it clear that it is not necessary for a party to secure a judgment in his favor in order to be a prevailing party. If a party achieves a substantial portion of the relief sought or succeeds on a significant issue as a result of an agreed settlement or a consent decree this is sufficient to support an award of attorney fees. . . . A plaintiff may also qualify as the prevailing party if his lawsuit is found to be the "catalyst" which causes the defendant to make significant changes in his past practices, though no direct relief is obtained."

Id. at 312 (citations omitted and emphasis in original) (quoting *Othen v. Ann Arbor School Board*, 699 F.2d 309, 313 (6th Cir. 1983))

Plaintiffs argue that this Court made it clear in its opinion of January 13, 1988, that Plaintiffs have succeeded in obtaining a "significant portion of the relief sought." Plaintiffs assert this litigation and the Court's order were the "catalyst" in recalling the laid-off police officers, protecting minorities in the DPOA and in obtaining the contractual charge protecting the laid-off officers' seniority.

Defendants, on the other hand, argue that, in reversing the prior fee award, the Sixth Circuit held Plaintiffs were no longer prevailing parties under 42 U.S.C. § 1988. They state that the Sixth Circuit ruling on fees "remains the law of the case, and that nothing has occurred to change it."

Defendants point to the language of the Sixth Circuit in its unpublished opinion reversing this Court's granting of fees. There, the court stated:

> "It is required that the plaintiffs prevail before attorney fees may be assessed against defendants, and plaintiffs are no longer prevailing parties. The award of fees is REVERSED accordingly." 819 F.2d 1142 (6th Cir. 1987).

Defendant City also claims that the Sixth Circuit vacated the relief granted to Plaintiffs, and remanded for further proceedings, consistent with its holding that this Court held the City defendants liable on a theory of law contrary to the appellate court's prior decision in *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir.), modified 719 F.2d 222 (6th Cir. 1983), cert. denied, 464 U.S. 1040 (1984). The City asserts that the best that can be said for Plaintiffs' claim is that the Sixth Circuit opinion did not foreclose consideration by this Court of an alternative legal basis for Defendants' liability, if a live controversy remained. However, the City argues that a reconsideration of the merits of Plaintiffs' claim is foreclosed because of this Court's opinion finding the entire case moot.[6]

Defendants further argue that the January 13, 1988, opinion of this Court' did not reestablish Plaintiffs' status as prevailing parties. Defendants assert that relief came through an injunction that has been determined on appeal to have been based upon a mistake of law that does not confer prevailing party status and does not support a fee award. See *Palmer v. City of Chicago*, 806 F.2d 1316, 1322 (7th Cir. 1986), cert. denied, 95 L.Ed 2d 826 (1987); *Doe v. Busbee*, 684 F.2d 1375, 1381-83 (11th Cir. 1982).

In sum, the City argues that the theoretical existence of an alternative basis on which the City could potentially have been held liable for a constitutional breach cannot form a basis for fee entitlement under § 1988, especially when the original theory of liability was found incorrect by the Court of Appeals.

Defendant DPOA also denies liability for fees. It argues that it cannot be shown that the NAACP was a prevailing party with reference to the DPOA. It asserts that the occurrence changing the racial composition of the DPOA was not as a result of this lawsuit, but reflected the racial composition of the City of Detroit, and that in no way could it be said that the Plaintiffs

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[6] See *NAACP v. DPOA*, 685 F. Supp. 1004 (E.D. Mich. 1988).

[7] *NAACP v. DPOA*, 676 F. Supp. 790 (E.D. Mich. 1988).

prevailed against the DPOA. DPOA contends that the order of this Court did not bring about the change. It asserts the racial composition of the Police Department changed because of the hiring of large numbers of new officers, 70 percent minority after the compliance of the City with this Court's order; this, in turn, affected the racial composition of the DPOA.

In summary, the DPOA asserts that Plaintiffs have not achieved any of the benefits they sought by virtue of their allegations against the DPOA, and have not shown that this lawsuit, and the attorneys' efforts, were a necessary factor in achieving a favorable result in their claims against the DPOA.

In order to be eligible for a fee award under § 1988, plaintiff must be a "prevailing party." Plaintiffs may be considered " 'prevailing parties' for attorney fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). It has further been held that, if a party's action was necessary to bring about a change in law or policy that renders a lawsuit moot, then that party is a prevailing party and eligible for attorney fees. See *Tucker v. Sommers*, 784 F.2d 654 (5th Cir.), cert. denied, 479 U.S. 821 (1986); *Martin v. Heckler*, 773 F.2d 1145 (11th Cir. 1985) (en banc). And, as the Sixth Circuit noted in *Loudermill*, "A plaintiff may also qualify as the prevailing party if his lawsuit is found to be the 'catalyst' which causes the defendant to make significant changes in its past practices, though no direct relief is obtained." 844 F.2d at 312 (quoting *Othen v. Ann Arbor School Board*, 699 F.2d 309, 313 (6th Cir. 1983)).

The First Circuit has stated, however, that this is only half the battle. "If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978). The Sixth Circuit adopted this reasoning in *Johnston v. Jago*, 691

F.2d 283, 286-87 (6th Cir. 1982), noting that this legal inquiry does not entail full trial on the merits. "Rather, the trial court need only consider whether the plaintiff's claim is 'frivolous, unreasonable or groundless.' " 691 F.2d at 286 (quoting *Nadeau*, 581 F.2d at 281.) The court noted that the Nadeau test requiring some "minimum basis in law for the relief secured . . . strikes the proper balance between rewarding the filing of wholly frivolous lawsuits on the one extreme and, on the other extreme, withholding fees unless the plaintiff's claim is fully evaluated on the merits." 691 F.2d at 286. In *Jago*, the court noted that a hearing was conducted before a magistrate where the magistrate concluded that plaintiff's civil action was causally linked to the relief achieved by the plaintiff through settlement of a State Personnel Board proceeding. The court found plaintiff's claim in this regard as not frivolous, even though defendants advanced certain potential defenses. The court then upheld the award of attorney fees.

Applying these standards, it would appear that Plaintiffs are prevailing parties against the City of Detroit under the catalyst test discussed in *Nadeau*, *Loudermill*, and *Jago*. The first consideration is whether there is a causal connection between the lawsuit and the resulting actions by the City. On this subject, the *Nadeau* court stated:

> "We should also note that we consider the chronological sequence of events to be an important, although clearly not definitive factor, in determining whether or not the defendant can be reasonably inferred to have guided his actions in response to plaintiff's lawsuit. This is particularly true where the evidence relevant to the causes of defendant's behavior is under defendant's control and not easily available to plaintiff." 581 F.2d at 281. Looking at the chronological sequence of events in this case, it is clear that the City acted the way it did because of the lawsuit.

The City of Detroit complied fully with this Court's order to return all officers laid off in 1979 and 1980, long prior to the decision of the Court of Appeals reversing and remanding the

case. It is clearly through the pursuing of this lawsuit, and the City of Detroit's compliance with this Court's order, that all of the officers who were laid off were reinstated. Clearly, from that point of view, the Plaintiffs were prevailing parties.

The second step, according to *Jago* and *Nadeau*, is to determine if there is some minimum basis in law for the relief secured. Defendant cites cases like *Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986), and *Doe v. Busbee*, 684 F.2d 1375 (11th Cir. 1982), to suggest that there is no basis in law, and that, since the injunction issued by this Court was based upon a mistake of law, Plaintiffs do not have prevailing-party status. However, the fact situations in those cases are different from those here in that in *Palmer* and *Doe*, the courts specifically found no legal basis for the relief obtained.

Here, while this court's January 1988 opinion did not make explicit findings of liability, it did recognize evidence that would suggest a finding of liability—at least enough to allow the Plaintiffs to continue with the cause of action after remand. This meets the test under *Jago* and *Nadeau* in that Plaintiffs' claims are not "frivolous, unreasonable, or groundless" and provide at least a minimum basis in law for the relief requested.

Therefore, this Court finds Plaintiffs to be "prevailing parties" against the City of Detroit.

With reference to the DPOA, it is clear to this Court that Plaintiffs are not prevailing parties. The change in the racial composition of the DPOA so that minorities make up 51.3 percent of the membership did not come about because of this lawsuit. It came about because the City of Detroit increased recruiting after it recalled the laid-off 1979 and 1980 officers. Many officers were recruited after that date, and 70 percent of them were minority officers. This is what changed the racial composition of the DPOA, and not the ruling of this Court. Therefore, this Court finds that, as to the DPOA, plaintiffs are not prevailing parties.

II

Nevertheless, this Court may not award attorney fees to the plaintiffs against the City of Detroit on the record as it now stands. In its unpublished opinion of June 8, 1987, *NAACP v. DPOA*, 819 F.2d 1142 (6th Cir. 1987), the court reversed the determination of this Court granting attorney fees. It said: "It is necessary, therefore, that we set aside the decision of the District Court with respect to allowance of fees to the attorneys for plaintiffs. It is required that the plaintiffs prevail before attorney fees may be assessed against defendants, and plaintiffs are no longer prevailing parties. The award of fees is REVERSED accordingly." The Court of Appeals did not reverse and remand, or remand for consideration in light of the final disposition of the case upon remand. In the substantive case,[1] the Sixth Circuit reversed and remanded the case to this Court for further action consistent with its opinion. In its dealing with the fee question, however, it simply reversed.

It therefore appears clear to this Court that the reversal is the law of the case, and that, absent action by the Court of Appeals, this Court cannot award fees. The reversal without remand leaves this Court with no jurisdiction to take any action in awarding fees to the Plaintiffs, even though the Court is of the opinion at this time that the Plaintiffs are prevailing parties against the City of Detroit.

Therefore, until the Court of Appeals authorizes this Court to consider the question of fees, this Court is without jursidiction to do so. It has been reversed, and the matter has not been returned to the Court.

For these reasons, the present petition of the Plaintiffs for attorney fees under 42 U.S.C. § 1988 must be denied.

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[1] *NAACP v. DPOA*, 821 F.2d 328 (6th Cir. 1987).

Opinion

N.A.A.C.P., DETROIT BRANCH; The Guardians, Inc.; Brady Bruenton; Cynthia Martin; Hilton Napoleon; Sharron Randloph; Betty T. Rolland; Grant Battle; Cynthia Cheatom; Evin Fobbs; John H. Hawkins; Helen Poelnitz, on behalf of themselves and all others similarly situated, Plaintiffs—Appellants,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); David Watroba, President; City of Detroit; Coleman A. Young, Mayor; Detroit Police Dept., Board of Police Commissioners; William Hart, Chief; William Milliken, Governor; The Michigan Employment Relations Commission, Defendants-Appellees

No. 88-1902.

United States Court of Appeals,
Sixth Circuit.

Argued July 31, 1989.

Decided April 9, 1990.

Rehearing and Rehearing En Banc
Denied June 18, 1990.

Employment discrimination action was filed on behalf of black police officers. Following an earlier remand, the United States District Court for the Eastern District of Michigan, 685 F.Supp.1004, Horace W. Gilmore, J., held that the action was rendered moot by events that occurred after the District Court entered an injunction. Appeal was taken. The Court of Appeals, Merritt, Chief Judge, held that: (1) the action was not moot: (2) the last hired, first-fired layoff provision of the collective bargaining agreement was a bona fide seniority system that was exempt from attack under Title VII; and (3) Title VII's provision that protects bona fide seniority systems from attack also extends to attacks under earlier civil rights statutes.

Vacated and remanded.

1. Federal Courts—13.10

Employment discrimination action brought by black police officers was not rendered moot, even after district court's injunction had been invalidated, by events that led to accomplishment of underlying goals of original injunction. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S. C.A. § 2000e-2(h); 42 U.S.C.A. §§ 1981, 1983.

2. Civil Rights—149

Title VII exempts bona fide seniority plans from attack, even if seniority system has disparate impact and even though result may perpetuate prior discrimination. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e-2(h).

3. Civil Rights—149

Last-hired, first-fired seniority system is bona fide and exempt from attack under Title VII unless seniority system was adopted or negotiated with discriminatory motivation or purpose or unless seniority system is administered in irregular or arbitrary way with intend to harm members of protected class. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e-2(h).

4. Civil Rights—149

Last-hired, first-fired seniority provision in collective bargaining agreement for city police officers was bona fide and exempt from attack under Title VII, even though seniority system had effect of requiring budgetary layoffs of disproportionate number of black police officers. Civil Rights Act of 1964, § 703(h), as amended 42 U.S.C.A. § 2000e-2(h).

5. Civil Rights—149

Title VII provision that exempts bona fide seniority systems from attack also applies to employment discrimination claims under earlier civil rights statutes. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e-2(h); 42 U.S.C.A. §§ 1981, 1983; U.S.C.A. Const. Amend. (11), § 5.

Thomas I. Atkins (argued), Brooklyn, N.Y., for plaintiff-appellant.

Jeanne Mirer, Barnhart & Mirer, Detroit, Mich., for plaintiffs.

Frank Jackson, Terri L. Hayles, City of Detroit Law Dept., Detroit, Mich., Daniel B. Edelman (argued), Yablonski, Both & Edelman, Washington, D.C., Allan D. Sobel, Rubenstein, Isaacs, Lax & Bordman, Southfield, Mich., Walter Nussbaum (deceased) (argued), and Michael A. Lockman, Detroit, Mich., for defendants-appellees.

Before MERRITT Chief Judge, and KENNEDY, Circuit Judge, and TODD, District Judge.*

MERRITT, Chief Judge.

In a previous appeal in this action our Court published on June 12, 1987, an opinion, *NAACP v. Detroit Police Officers Ass'n*, 821 F.2d 328, 333 (6th Cir. 1987), holding that a purely *voluntary* affirmative action plan instituted by Mayor Young and the City designed to increase minority representation in the Detroit Police Department could not override the last-hired, first-fired layoff provision of the Union's collective bargaining agreement with the City.[1] We held further that because the Union had

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* The Honorable James D. Todd, United States District Judge for the Western District of Tennessee, sitting by designation.

[1] This case comes to us with a long procedural history. Plaintiffs initiated this action on September 30, 1980, against Mayor Coleman A. Young, the local police union called the Detroit Police Officers Association, the City of Detroit, and other Detroit municipal officials and agencies. In essence,

not engaged in intentional discrimination, its failure to bargain forcefully against the layoffs made for budgetary reasons did not breach its duty of fair representation. The appeal in the previous case was from a ruling by the District Court that the voluntary plan alone by its own force required a finding of liability against the City and Mayor Young, and an injunctive order disallowing them from laying off 900 black police officers until the plan goals had been met. *See NAACP v. Detroit Police Officers Ass'n*, 591

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plaintiffs made two claims concerning layoffs that the Mayor ordered because of budget constraints:

> 1) that the layoffs ordered by Mayor Young of approximately 900 black police officers pursuant to a layoff provision in the collective bargaining agreement were discriminatory in light of the unmet remedial obligation of the City and the Police Department to undo the effects of past racial discrimination; and
>
> 2) that the Union engaged in racial discrimination and breached it duty of fair representation by failing to actively oppose the layoffs of the black police officers ordered by Mayor Young

Plaintiffs sought declaratory relief, reinstatement, nondiscriminatory assignments, restoration of seniority, back pay, out-of-pocket expenses, and an injunction against future layoffs. After four years of proceedings in the court below, the District Court, applying collateral appeal, held that our decision in *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983) (*Bratton I*) (City's voluntary affirmative action plan regarding police department promotions to service upheld, *modified*, 712 F.2d 222 (6th Cir.1983) (*Bratton II*), aff'g *Baker v. City of Detroit*, 504 F.Supp. 841 (E.D.Mich.1980), *modifying Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich.1979), *cert. denied.*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984), automatically foreclosed further litigation on the issue of prior discrimination in the police department and precluded the City from laying off any police officers under Mayor Young's planned reduction in force. *See NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. 1194 (E.D.Mich.1984). Because it perceived that the layoffs reversed the effects of the voluntary affirmative action plan, the District Court enjoined the City from laying off any police officers in accordance with the seniority provisions of the collective bargaining agreement without prior court approval, and ordered reinstatement of all officers previously laid off. The District Court further found that the DPOA had breached its duty of fair representation by not forcefully fighting the layoffs. *Id.* at 1219.

F. Supp. 1194 (E.D. Mich.1984). We reversed the injunctive orders below and remanded the action for further proceedings.

I

On remand, after conducting proceedings on the motions of the parties for summary judgment, the District Court declared the issues moot and dismissed the case. The court did not reach the defendants' claim that the budgetary layoffs of the black officers were protected under § 703(h) of Title VII because they were made pursuant to a bona fide seniority plan[2] Plaintiffs have now appealed the mootness ruling. We reverse the District Court's decision that the case is moot but conclude that the defendants are protected from liability because the layoffs occurred pursuant to a bona fide seniority plan insulated under § 703(h).

The District Court considered on remand the City's motion for entry of judgment on plaintiffs' § 1983 claim, and the Union's motion for summary judgment on plaintiffs' §§ 1983 and 1981 claims. The court first granted the Union's § 1983 motion and denied the others, reasoning that the trial requested by plaintiffs was not precluded by this Court's determination in *NAACP v. Detroit Police Officers Ass'n*, 821 F.2d 328, that prior discrimination in the police department could not be established solely from our previous approval of a purely voluntary affirmative action plan. Without conducting a trial, the District Judge found that "[e]ven though [the District] Court does not ascribe racial animus to the Mayor and his administration," "race was a motivating factor in the City's action to layoff black officers."

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[2] Title VII, § 703(h), as set forth in 42 U.S.C. § 2000e-2(h), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate . . . .

NAACP v. Detroit Police Officers Ass'n, 676 F.Supp. 790, 795 (E.D.Mich.1988) (citing *NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. at 1202). On the plaintiffs' claim against the Union, the District Judge first recognized that we concluded on the first appeal that he had found no intentional discrimination or other improper motivation in the Union's reaction to the threatened layoffs. But again, without conducting a trial, the District Judge, in denying the Union's motion for summary judgment, found that his findings in *NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. 1194, "were tantamount to a finding of intentional discrimination . . . ." *NAACP v. Detroit Police Officers Ass'n*, 676 F.Supp. at 797.

After denying defendants' motions for summary judgment, the court ordered briefing on whether plaintiffs' claims had been mooted by events occurring after the injunctive orders had been issued.

[1] Because all the officers laid off had been recalled with retroactive seniority, he concluded that plaintiffs' claims against the City were moot. This conclusion rested on the District Judge's observation that the Union membership had become predominately black, a fact enabling black police officers to protect themselves through their voting power and the opportunity to enter Union leadership. It is this ruling that plaintiffs now appeal.

In dismissing the case, the District Judge said that even though this Court had invalidated his injunctive orders the action was moot because "[e]verything the [District] Court sought to accomplish in it original judgement . . . [by the injunction] has been accomplished." *NAACP v. Detroit Police Officers Ass'n*, 685 F.Supp. 1004, 1007 (E.D.Mich.1988). Specifically, the District Court reasoned that by 1988 all of the officers laid off in 1979 and 1980 had been recalled with full seniority rights thus leaving no case or controversy between plaintiffs and the City. In addition, since completing the recall in 1985, the City had hired 1,290 new officers. The court also held that since the majority of

the membership at the DPOA was not comprised of blacks and other minorities, these minorities had acquired the ability to protect themselves through intra-union political action, thus rendering moot the plaintiffs' claim against the DPOA.

This ruling was erroneous. First the fact that the District Court has accomplished the goals of its own injunctive order, later reversed as having no basis in law, does not render a case moot. Second, assuming for the moment that the plaintiffs had a viable § 1983 claim against the City or the Union for the 1979-80 layoffs, the appropriate remedy would require more than mere recall and retroactive seniority. It would include the determination of other benefits such as backpay and out-of-pocket costs incurred by the laid-off police officers. Such an interest has been recognized as a "concrete interest in the outcome of litigation." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 164 S.Ct. 2576, 2584, 81 L.Ed.2d 483 (198-Q) Third, minority police officers' majority membership in the Union does not "without more" translate into the ability to protect themselves against discriminatory action by the leadership. Rather, their ability to protect themselves depends on factors such as the Union's organizational structure and could not be evaluated in the abstract without further inquiry. In light of these factors, including the Supreme Court's holding in *Stotts*, we conclude that the controversy was not moot.

II

Our inquiry may not end here, however. The defendants moved the District Court for dismissal of the case on alternative grounds. Because, as defendants contended in the court below,[3] the plaintiffs' case is based on a fundamentally erroneous legal theory, we conclude that the case must be dismissed.

In their original complaint, plaintiffs claimed that defendants engaged in discriminatory employment practices that violated the Thirteenth and Fourteenth Amendments to the Constitution, post-Civil War civil rights acts now codified at 42 U.S.C. §§ 1981, 1983 and 1985(3), and Titles VI and VII[4] of the Civil Rights Act of 1964. On this appeal, plaintiffs have preserved only their claims under 42 U.S.C. §§ 1981 and 1983. These claims are barred by § 703(h) of Title VII.

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[3] In their motions and supporting briefs, the Union claimed that § 703(h) of Title VII protected it from liability. *See* DPOA's Brief in Support of Motion for Summary Judgment (Section] 703(h) of Title VII, 42 U.S.C. 2000e-2(h) insulates bona-fide seniority systems from attack through civil rights statutes . . . ."). The City raised the issue as well, relying on the bona fide seniority plan as legal justification for the layoffs. *See* City Defendants' Motion for Entry of Judgment ("[T]he Sixth Circuit determined that the City Defendants acted lawfully and conditionally in making layoffs in 1979 and 1980 pursuant to the *bona fide* seniority provision . . ."); Memorandum of Points and Authorities in Support of City Defendants' Motion for Entry of Judgment ("[T]he Sixth Circuit's opinion . . . upheld the 1979 and 1980 layoffs . . . made pursuant to a *bona fide* seniority provisions, as lawful and constitutional."). This District Judge ignored the defendants § 703(h) defense and his ruling on defendants' motions for judgment failed to discuss the issue.

[4] Although plaintiffs now say they did not assert a Title VII claim in this case, their complaint belies their assertion:

> The violations of law in Counts I, II and III violate the national policy declaration against discrimination in employment articulated by Congress in Title VII of the Civil Rights Act of 1964.

Plaintiffs' Complaint, Count IV.

Title VII is a remedial statute, designed "to assure equality of employment opportunities . . . ." *McDonnell Dougals Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 1823, 36 L.Ed.2d 668 (1973). The Act was designed to bar not only overt employment discrimination, "but also practices that are fair in form, but discriminatory in operations," *Griggs v. Duke Power Co.*, 401 U.S.C.A. 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). "Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group." *International B'rd of Teamsters v. United States*, 431 U.S. 324, 349, 97 S.Ct. 1843, 1861-62, 52 L.Ed.2d 396 (1977).

The Act's treatment of seniority systems, however, establishes an exception to liability for employment discrimination based on race. From the *Teamsters* case on, the Supreme Court has recognized that were it not for Title VII's § 703(h) exception, last-hired, first-fired seniority plans would be invalid under the *Griggs* rationale. *Id.; see Lorance v. AT & T Technologies, Inc.*—U.S.—, 109 S.Ct.2261, 2265, 104 L.Ed.2d 961 (1989) (quoting *Trans World Airlines Inc. v. Hardison*, 432 U.S. 63, 81, 97 S.Ct. 2264, 2275, 53 L.Ed.2d 113 (1977)) ("[S]eniority systems . . . are afforded special treatment under Title VII"); *see also Hardison*, 432 U.S. at 79, 97 S.Ct. at 2274 ("Collective bargaining . . . lies at the core of our national labor policy, and seniority provisions are universally included in these contracts"). Special treatment for seniority systems strike a balance between the interests of those protected against discrimination by Title VII and those who work—perhaps for many years—in reliance upon the validity of a facially lawful seniority system. *Lorance*, 109 S.Ct. at 2265.

[2] The provision that exempts seniority plans from attack under Title VII, section 703(h), as set forth in 42 U.S.C. § 2000e-2(h), provides in pertinent part:

Opinion

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . .

Congress included within the sentence quoted above a proviso that limits to some extent the protection extended to, *inter alial*, "bona fide seniority system[s]";[5] provided that such differences are not the result of an intention to discriminate . . . .

Section 703(h) is not an affirmative defense to the conduct described as illegal in Title VII. *See Lorance*, 109 S.Ct. at 2267. Rather, it has been regarded as a definitional provision, *id.*, which " 'delineates which employment practices are illegal and thereby prohibited and which are not.' " *United Air lines, Inc. v. Evans*, 431 U.S. 553, 559, 97 S.Ct. 1885, 1889-90, 52 L.Ed.2d 571 (1977) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758, 96 S.Ct. 1251, 1261, 47 L.Ed.2d 444 (1976)). In determining which seniority systems are legal under Title VII,

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[5] Title VII does not define the term "seniority system," and no comprehensive definition of the phrase emerges from the legislative history of § 703(h). *See* 110 Cong.Rec. 1518, 5423, 7207, 7213, 7217, 12,723, 15,893 (1964). The example of a seniority system most frequently cited in the congressional debates was one that provided that the "last hired" employee would be the "first fired." *Id.; see California Brewers Ass'n v. Bryant*, 444 U.S. 598, 605 n. 10, 100 S.Ct. 814, 819 n. 10, 63 L.Ed.2d 55 (1980) (requirement under collective bargaining agreement that temporary employee must work at least 45 weeks in a year before claiming benefits attending permanent-employee status is a "seniority system" within § 703(h)). In the area of labor relations, "seniority" is a term that connotes length of employment. A "seniority system" is a scheme that allots to employees *ever* improving employment rights and benefits as their relative lengths of permanent employment increase. *Id.* The principal feature of any and every seniority system is that preferential treatment is dispensed on the basis of some measure of time served in employment. *Id.* Given the lengthy legislative history and comprehensive discussions found in Supreme Court opinions on the topic, it is clear that the last-hired, first-fired provision before us is a "seniority system" within the meaning of subsection(h).

that is, which are "bona fide" and thus not precluded by the proviso, the Supreme Court has consistently held that under subsection (h), a showing of disparate impact is insufficient to invalidate a seniority system, even though the result may be to perpetuate pre- or post-Act[6] discrimination. In the Court's review, "the unmistakable purpose of § 703(h)," *Teamsters*, 431 U.S. at 352, 97 S.Ct. at 1863, was to allow employers and unions routinely to apply bona fide seniority systems even though the employer's discriminatory hiring practices may have resulted in whites having greater seniority than blacks. *See, e.g., Stotts*, 467 U.S. at 587, 104 S.Ct. at 2592 (O'Connor, J., concurring) ("Title VII affirmatively protects bona fide seniority systems, including those with discriminatory effects on minorities."); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 65, 102 S.Ct. 1534, 1535-36, 71 L.Ed.2d 748 (1982) (under § 703(h), discriminatory impact alone will not invalidate otherwise rigid system); *Hardison*, 432 U.S. at 82, 96 S.Ct. at 2276 ("[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."); *Teamsters* 431 U.S. at 350, 97 S.Ct. at 1862 (although Title VII violation may be established by facially neutral practices that freeze prior discrimination, "both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them."); *White v. Colgan Elec. Co.*, 781 F.2d 1214 (6th Cir. 1986) (inverse layoff procedure controls even when it retards goals of consent decree); *see also* 110 Cong. Rec. 7207, 7213, 7217 (1964) (Title VII has no effect on established seniority rights).

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[6] Any doubt over whether § 703(h) protects discriminatory systems applied or adopted after the enactment of Title VII was settled in *American Tobacco Co. v. Patterson* 456 U.S. 63, 75-76, 102 S.Ct. 1534, 1540-41, 71 L.Ed.2d 748 (1982) which held that it does. The majority's position in *American Tobacco* was anticipated by the Court in *Teamsters*, 431 U.S. at 348 n. 30, 352, 97 S.Ct. at 1861 n. 30, 1863, and *Evans*, 431 U.S. at 558, 97 S.Ct. at 1889.

In order to avoid dismissal, therefore the plaintiffs' challenge to a seniority system under Title VII must allege facts which if true, would make out a case of discriminatory intent. *See Lorance*, 109 S.Ct. at 2368 (successful claim depends on proof of intentionally discriminatory adoption of facially lawful system); *Pullman-Standard v. Swint*, 456 U.S. 273, 289, 102 S.Ct. 1781, 1790, 72 L.Ed.2d 66 (1982) ("Differentials among employees that result from a seniority system are not unlawful employment practices unless the product of an intent to discriminate."); *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 610-11, 100 S.Ct. 814, 821-22, 63 L.Ed.2d (1980) (remanding to district court to test whether system was bona fide or whether differences in employment conditions it produced resulted from purposeful racial discrimination); *Evans*, 431 U.S. at 560, 97 S.Ct. at 1890 ("Since respondent does not attack the bona fides of [the employer's] seniority system, and since she makes no charge that the system is intentionally designed to discriminate because of race . . . [or] sex, . . . § 703(h) [defeats her claim].").

III

[3] Neither Mayor Young, the City, nor the Union expected the layoffs to affect white and black officers equally. The defendants knew that enforcement of the seniority plan would have a discriminatory impact on newly hired black officers. This type of discrimination, however, is congressionally immunized by § 703(h) and by the decisions of the Supreme Court:

> Congress was well aware in 1964 that the overall purpose of Title VII, to eliminate discrimination in employment, inevitably would, on occasion, conflict with the policy favoring minimal supervision by courts and other governmental agencies over the substantive terms of collective-bargaining agreements. Section 703(h) represents the balance Congress struck between the two policies, and it is not this Court's function to upset that balance.

American Tobacco, 456 U.S. at 76-77, 102 S.Ct. at 1541-42 (citation and footnote omitted).

Of course, § 703(h) and its proviso does not immunize *all* seniority systems from attack under the civil rights statutes. It refers only to "bona fide" systems. As the Supreme Court has stated:

> Significant freedom must be afforded employers and unions to create differing seniority systems. But that freedom must not be allowed to sweep within the ambit of § 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system, simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority. There can be no doubt, for instance, that a threshold requirement for entering a seniority track that took the form of an educational prerequisite would not be part of a "seniority system" within the intendment of § 703(h).

California Brewers Ass'n, 444 U.S. at 608-09, 100 S.Ct. at 821.

Whether last-hired, first-fired seniority provisions are bona fide was answered at the legislative hearings on Title VII. *See* 110 Cong.Rec. 1518, 5423, 7202, 7213, 7217, 12,723, 15,893 (1964). During the congressional debate on § 703(h), Senator Clark placed in the Congressional Record a Justice Department statement, later endorsed by the Supreme Court, which stated:

> It is perfectly clear that when a worker is laid off . . . because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. . . . But, in the ordinary case, assuming that seniority rights were built up

> over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race.

Franks, 424 U.S. at 760 n. 16, 96 S.Ct. at 1262 n. 16 (quoting 110 Cong.Rec. 7207 (1964)).

Therefore, in analyzing the scope of subsection (h) and its proviso in light of the pertinent Supreme Court cases and the legislative history of § 703(h), we conclude that in order to prevail, a plaintiff must show either that the employer's practice is not a seniority system or part of a seniority system, or that the seniority system is not bona fide. A seniority system is not bona fide if one of the following criteria is met: 1) that the seniority system was adopted or negotiated with a discriminatory motivation or purpose; or 2) that the seniority system was administered in an irregular or arbitrary way with intent to harm members of a protected class.

IV

[4] In the instant case, plaintiffs do not claim that the last-hired, first-fired provision to which the Union and the City agreed in 1967 as part of their first collective bargaining agreement, was not a seniority plan or part of a seniority plan. Nor have they at any stage of this litigation challenged the bona fides of the plan, Supplemental Brief for Plaintiffs-Appellants at 14 ("Plaintiffs throughout have not questioned whether the seniority system was bona fide. . . ."), or that the plan met any of the criteria listed above as evidence that a plan is not bona fide. Nor do plaintiffs contend that the same plan was re-adopted subsequently by Mayor Young, the City, or the Union for the purpose of discriminating against blacks, *see NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. at 1219, or that its layoff provisions were administered in an irregular or arbitrary way in order to harm black officers. *See id.* at 1202; Plaintiffs' Complaint ¶ 6, at

22 (failure to modify seniority plan is facially neutral but discriminatory in *effect*).

Instead, plaintiffs argue only that Mayor Young and the City "strictly followed" the provision, and that the Union refused to *modify* the provision in the collective bargaining agreement when warned that the clause would require the layoff of minorities recently hired under the City's affirmative action plan. Plaintiffs' Complaint ¶¶ 36-37, at 14-15; *id.* ¶ 1(c), at 27. Their claim that the seniority plan, by "requir[ing] officers with the least seniority to be laid off first," "perpetuat[ed] the racially discriminatory impact of the previous illegal exclusion of minorities from the police force," *id.* ¶ 61, at 18; *see also id.* ¶ 4, at 22, describes the type of Title VII discrimination generally prohibited by *Griggs* specifically immunized according to Supreme Court interpretations of § 703(h) discussed above.

Little would be left of *Teamsters* if the results of the normal operation of a concededly bona fide seniority system could establish racial discrimination. *See Teamsters* 431 U.S. at 352, 97 S.Ct. at 1863; *are also California Brewers Ass'n,* 444 U.S. at 600, 100 S.Ct. at 816. In such a case the employer would be found liable not for present racial discrimination but for complying with a seniority system. Such a ruling would be plainly inconsistent with the dictates of § 703(h), both on its face and as interpreted in the decisions of the Supreme Court.

V

On facts similar to those before us, the Supreme Court's decision in *Stotts* makes the same essential point as the cases described above: Section 703(h) will have the effect of preserving some prior discrimination—an effect that contracting parties are aware of and intend when they enter into such agreements. But the congressional purpose in adopting § 703(h) was to give such contracts priority over plans which alter seniority through racially based layoffs. In *Stotts,* the City of Memphis had adopted an affirmative action plan by consent decree requiring an

increase in the proportion of minority employees in its fire department. As in Detroit, budgetary cuts led to layoffs, under which many of the black employees who had been hired pursuant to the consent decree would have been laid off first. The Court held that the District Court lacked the power to enforce a consent decree requiring layoffs in conflict with the bona fide seniority provision of the collective bargaining agreement. In so doing, the Court rejected the argument that

> because the City was under a general obligation to use its best efforts to increase the proportion of blacks on the force, it breached the decree by attempting to effectuate a layoff policy reducing the percentage of black employees in the Department even though such a policy was mandated by the seniority system adopted by the City and the Union.

Stotts, 467 U.S. at 573-74, 104 S.Ct. at 2585. The Court concluded that neither the decree nor the parties contemplated that the City would "simply disregard its arrangements with the Union." *Id.* at 574, 104 S.Ct. at 2585. Because the District Court's order enjoining the City from layoffs that would decrease black membership in the department conflicted with § 703(h), and because the District Court had found that the layoff proposal was not adopted with the purpose or intent to discriminate on the basis of race, the action of the District Court enjoining the City from applying its seniority system in making the layoffs was reversible error. *Id.* at 579-83, 104 S.Ct. at 2588-90.

The seniority provision in this case, which plaintiffs challenge on the same grounds, must be upheld for the same reasons. Neither case involved a claim or finding that the seniority plan was adopted or imposed with a discriminatory purpose. Likewise, neither the consent decree in *Stotts* nor the voluntary affirmative action plan here provided for or suggested any departure or intent to depart from the City's collective bargaining agreement with the Union. *NAACP v. Detroit Police Officers Ass'n*, 821 F.2d at 332-33.

It should be noted that the Supreme Court declined to enforce a judicially approved consent decree so as to reverse the effects of layoffs under a bona fide seniority plan. Likewise, we may not enforce the purely *voluntary* plan in order to reverse the effects of the bona fide seniority plan here. We thus are barred by *Stotts* from interpreting the voluntary affirmative action plan before us to require the City to disregard the seniority provisions of the collective bargaining agreement, and hold that plaintiffs' claims should have been dismissed below as a matter of law.[7]

Absent a finding of intentional discrimination under the proviso to § 703(h), we may not reverse or enjoin the operation of a bona fide seniority plan that Congress intended to validate and

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[7] Plaintiffs rely on *United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (plurality opinion), in which the Court held that a one-for-one promotion requirement to redress past and present discrimination against black state troopers in Alabama withstood strict scrutiny analysis under the Fourteenth Amendment. *Paradise* did not involve layoffs under a bona fide seniority plan protected by § 703(h). It thus is inapposite in that it fails to test the validity of an inverse seniority layoff plan like the one at issue here.

In his plurality opinion in *Paradise*, Justice Brennan emphasized another aspect of the distinction between hiring and promotions and layoffs. He reasoned that the one-for-one requirement in *Paradise* was less burdensome than the layoff provision in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), which was invalid because it required the discharge of more senior white employees in favor of less senior blacks. *See Paradise*, 480 U.S. at 182-83, 107 S.Ct. at 1073 (Brennan, J.); *id.* at 188-89, 107 S.Ct. at 1076 (Powell, J., concurring).

protect when it passed § 703(h). Congress in so doing acted pursuant to its enforcement powers under section 5 of the Fourteenth Amendment.[8] *See Fullilove v. Klutznick* 448 U.S. 448, 472-73, 100 S.Ct. 2758, 2771-72, 65 L.Ed.2d 902 (1980) (plurality opinion) ("[W]e are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment.") (citations omitted); *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 1723-24, 16 L.Ed.2d 828 (1966) ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."). No court has held, and plaintiffs do not contend, that § 703(h) is unconstitutional. Thus, it must be applied to validate and protect the bona fide seniority plan at issue in this case and the layoffs and recalls that occurred under it.

VI

[5] Although plaintiffs content that the protections granted to bona fide seniority systems under § 703(h) apply only to claims brought under Title VII, we decline to read Congress's earlier, more general pronouncements in §§ 1981 and 1983 from the Civil Rights Act of 1870 to undermine the force of its later specific declarations of civil rights policy regarding bona fide seniority plans in § 703(h) of the Civil Rights Act of 1964. Basic principles of statutory construction dictate this result:

> General and special acts may be in pari materia. If so, they should be construed together. Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict,

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[8] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

> the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling. . . . Where the special statute is later it will be regarded as an exception to or qualification of the prior general one. . . .

Sutherland Statutory Construction § 51.05, at 499-500 (N. Singer ed. 1984) (footnotes omitted). The Supreme Court has consistently endorsed this canon of construction. *See, e.g., Brown v. General Servs. Admin.*, 425 U.S. 820, 834, 96 S.Ct. 1961, 1968-69, 48 L.Ed.2d 402 (1976) ("In a variety of contexts the Court has held that a precisely drawn, detailed statute preempts more general remedies,"); *Preiser v. Rodriquez*, 411 U.S. 475, 489-90, 93 S.Ct. 1827, 1836-37, 36 L.Ed.2d 439 (1973) (although § 1983 by its terms was literally applicable to prisoners' actions, challenges to fact or duration of imprisonment appropriately lie only under habeas corpus, the "more specific act").[9] Inherent in the Court's admonition that statutes such as those before us be read *in pari materia* is its recognition that Congress passed all three Acts pursuant to its enforcement powers under § 5 of the Fourteenth Amendment. Title VII, in addition to being enacted nearly a century later, devotes 27 pages of the United States Code to a detailed treatment of employment discrimination. In drafting §§ 1981 and 1983, on the other hand, Congress conferred on all citizens, in two paragraphs drafted in general terms, equal rights "to make and enforce contracts," (§ 1981) and a private right of action to redress state-sponsored deprivations of civil rights (§ 1983).

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[9] The Court frequently has held that a narrowly tailored employee compensation scheme preempts the more general tort recovery statutes. *E.g., United States v. Demko*, 385 U.S. 149, 87 S.Ct 382, 17 L.Ed.2d 258 (1966) (18 U.S.C. § 4126; Federal Tort Claims Act); *Patterson v. United States*, 359 U.S. 495, 79 S.Ct. 936, 3 L.Ed.2d 971 (1959) (Federal Employees' Compensation Act; Suits in Admiralty Act); *Johansen v. United States*, 343 U.S. 427, 72 S.Ct. 849, 96 L.Ed. 1051 (1952) (Federal Employees' Compensation Act; Public Vessels Act).

Opinion

Assuming without deciding that plaintiffs set forth colorable claims against the Union under § 1981[10] and against the City and city officials under § 1983,[11] we decline to endorse plaintiffs' claim that Title VII's legislative protection of bona fide seniority plans can be evaded simply by characterizing an action otherwise falling within the parameters of Title VII as a § 1981 or § 1983 suit. Congress did not intend that its detailed remedial scheme

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[10] Plaintiffs contention that the Union's failure to protect black officers from layoffs may not state a claim according to the Supreme Court's most recent interpretation of § 1981, which narrowed the statutory breadth of the phrase "to make and enforce contracts." *See Patterson v. McLean Credit Union*,—U.S.—, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). There, the Court held that "post-formation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII." *Id.* 109 S.Ct. at 2373. Further, the Court limited the right to enforce contracts to "conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." *Id.*

Because plaintiffs in our case seek relief under § 1981 for post-formation conduct by the Union, and do not claim that their right to invoke the legal process has been hindered, *Patterson* may preclude their § 1981 action altogether. In light of our understanding of the impact of § 703(h) on § 1981, however, we need not reach the question of how *Patterson* might affect plaintiffs' § 1981 claim.

[11] Likewise, plaintiffs, § 1983 claim, grounded in the notion that the inverse layoff plan and procedure deprived the laid-off black police officers of equal protection of the laws under the Fourteenth Amendment, also may be without merit by virtue of previous decisions rendered in this litigation. We already have held that the City 's institution of a voluntary affirmative action plan, based on the City's own determination that it had discriminated in the past, was constitutionally permissible but did not mandate a court-ordered remedy tantamount to a permanent contract of employment. *See NAACP v. Detroit Police Officers Ass'n*, 821 F.2d at 331; *Bratton II*, 712 F.2d at 223; *see also Bratton I*, 704 F.2d at 902 (Merritt, J. dissenting). Accordingly, plaintiffs' § 1983 claim could well be precluded by the "law of the case." Again, however, as with plaintiffs' § 1981 claim against the Union, we believe that § 703(h) insulates the City and its officials from liability under § 1983, and therefore need not decide whether plaintiffs state a valid claim under the latter.

constructed in Title VII be circumvented through pleadings that allege other causes of action under general statutes.

Although the Supreme Court has recognized that Congress did not, with the passage of the Civil Rights Act of 1964 and its 1972 amendments, intend to repeal existing statutes in the civil rights field, or make Title VII the exclusive remedy in all employment discrimination contexts,[12] *see Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (timely filing of Title VII action does not toll statute of limitations period applicable to § 1981 action brought on same facts) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49, 94 S.Ct. 1011, 1020, 39 L.Ed.2d 147 (1974) (Title VII action not forfeited when plaintiff first pursues arbitration of grievance under collective bargaining agreement), it also has declined to permit artful pleading to avoid both the requirements and consequences of a Title VII action by any other name. *See Patterson v. McLean Credit Union*,—U.S.—, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (post-formation conduct more naturally governed by state contract law and Title VII than by § 1981); *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 375-76, 99 S.Ct. 2345, 2350-51, 60 L.Ed.2d 957 (1979) (section 1985(3), which creates no substantive rights, cannot be used to bypass administrative process of Title VII); *Brown*, 425 U.S. at 828-29, 96 S.Ct. at 1965-66 (congressional intent in 1972 amendments was *inter alia*, to create exclusive judicial scheme for redress of federal public employment discrimination, thus distinguishing *Johnson*, which applies only to private employment discrimination).

Although the Supreme Court has yet to address directly the relationship between § 703(h) and the earlier civil rights statutes, our decision to read these overlapping provisions in *pari materia* is reinforced by the decisions of other courts of appeals, *See, e.g.*,

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[12] In drafting the Equal Employment Opportunity Act of 1972, which extended the protections of Title VII to public employment contexts, the Senate rejected an amendment that would have deprived a claimant of any right to sue under § 1981. *See* 118 Cong.Rec. 3371-73 (1972).

Chance v. Board of Examiners & Bd. of Educ., 534 F.2d 993, 998 (2d Cir. 1976) ("Congress has clearly placed its stamp of approval upon seniority systems in 42 U.S.C. § 2000e-2"; "[t]hat plaintiffs herein are proceeding under 42 U.S.C. §§ 1981, 1983 does not render defendants' seniority system any more susceptible to attack."), *cert. denied*, 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060 (1977); *Watkins v. United Steel Workers of America*, 516 F.2d 41, 49-50 (5th Cir.1975) (although § 1981 prohibits some employment practices not unlawful under Title VII, provisions of collective bargaining agreement are valid under § 703(h) and do not violate § 1981); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191-92 n. 37 (5th Cir.1978) ("[T]he protection[s] accorded bona fide seniority systems by section 703(h) apply whether suit is brought under Title VII or section 1981."), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 122 n. 3 (5th Cir.1980) ("No chameleon-like change in the nature of the relief is experienced simply because it is sought under sister provisions in the federal statutes."); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1320 n. 4(7th Cir.1974) ("Having passed scrutiny under . . . Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. § 1981."), *cert. denied*, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976); *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1348-49 (11th Cir.1983) (close relationship between Title VII and § 1981 leads to conclusion that § 703(h) applies to § 1981 claims); *Larkin v. Pullman-Standard Div., Pullman, Inc.*, 854 F.2d 1549, 1575 n. 41 (11th Cir.1988) (immunity created by § 703(h) extends to § 1981 claims).

No case in our Court has previously examined the § 703(h) issue presented here. We have, however, interpreted other specific provisions of Title VII as limitations upon a § 1983 cause of action. *See Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199 (6th Cir.1984). It would be anomalous, we said, to permit plaintiffs to bypass the administrative procedures of Title VII simply by proceeding under § 1983. *Id.* at 1204. We reserved

ruling on the relationship between § 1981 and Title VII, however. Although *Day* suggests that Title VII and § 1981 are not mutually exclusive remedies in general, it does not discuss whether § 703(h) may protect bona fide seniority plans attacked under other civil rights statutes that pre-date Title VII.

VII

The plaintiffs neither state nor offer any facts or claim in their pleadings or in evidentiary material offered on summary judgment on the basis of which, if true, a federal court could hold that the seniority system at issue is barred by § 703(h) of Title VII. Plaintiffs' theory of liability is without merit. Section § 703(h) governs and protects the seniority-based layoffs by Mayor Young, the City, and the Union under the bona fide seniority plan negotiated as part of the collective bargaining agreement between the City and the Union.

The District Court's erroneous judgment that the cause is moot is vacated and set aside.

The case is remanded to the District Court with instructions to dismiss the complaint, as supplemented by additional factual allegations and evidentiary material in motions and other documents in the record, for failure to state a claim under Rules 12(b) and 56 of the Federal Rules of Civil Procedure.[13]

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[13] Rule 12(b) states in pertinent part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .
>
> Fed.R.Civ.P. 12(b).

Rule 56 states in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> Fed.R.Civ.P. 56(c)

No. 88-1902

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

N.A.A.C.P., DETROIT BRANCH, *Plaintiff-Appellant*, THE GUARDIANS, INC., ET AL., *Plaintiffs* v. DETROIT POLICE OFFICERS ASSOCIATION, ET AL., *Defendants-Appellees*	ORDER

BEFORE: MERRITT, Chief Judge; KENNEDY, Circuit Judge; and TODD, United States District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, *Clerk*

*Hon. James D. Todd sitting by designation from the Western District of Tennessee

N.A.A.C.P., Detroit Branch; THE GUARDIANS, INC.; BRADY BRUENTON; CYNTHIA MARTIN; HILTON NAPOLEON; SHARRON RANDOLPH; BETTY T. ROLLAND; GRANT BATTLE; CYNTHIA CHEATON; EVAN FOBBS; JOHN H. HAWKINS, HELEN POELNITZ, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

THE DETROIT POLICE OFFICERS ASSOCIATION (D.P.O.A.); DAVID WATROBA, President; THE CITY OF DETROIT; COLEMAN A. YOUNG, Mayor; DETROIT POLICE DEPARTMENT; BOARD OF POLICE COMMISSIONERS; WILLIAM HART, Chief; WILLIAM MILLIKEN, Governor; THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION, Defendants-Appellees

914 F.2d 1494 (6th Cir. 1990)

September 27, 1990, Filed

NOTICE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY

On Appeal from the United States District Court for the Eastern District of Michigan; No. 80-73693; Gilmore, Judge.

JUDGES: Merritt, Chief Judge; Nelson and Norris, Circuit Judges.

OPINION

The question at issue in this appeal is whether plaintiffs are "the prevailing party" within the meaning of 42 U.S.C. § 1988, under which "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." A summary of the history of this litigation is contained in our most recent opinion. *NAACP v. DPOA*, 900 F.2d 903 (6th Cir. 1990). There we concluded that the plaintiffs' case was without merit and remanded with instructions to dismiss, a change in the status of the case that would obviously affect any decision concerning the award of attorneys fees. We therefore also reversed the District Court's previous decision on attorneys fees in light of our disposition of the merits, although we did not intend our decision to preclude the exercise of jurisdiction over future applications for attorneys fees. The District Court's decision that it lacked jurisdiction therefore misconstrued our decision.

In *Texas State Teachers Ass'n v. Garland Independent School District*, 109 S. Ct. 1486, 1491, 1493 (1989), the Court discussed the law applicable to the instant case. It "noted that no fee award is permissible until the plaintiff has crossed the 'statutory threshold' of prevailing party status" and held as an "absolute limitation" on this status that the "plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." In our previous, above-cited decision in this case, we held that plaintiffs were entitled to no relief on the merits of their claims. They were not entitled to achieve, and did not achieve, any permanent change in the legal relationship of the parties by virtue of any legal theory presented for review in this Court. The injunctive decrees of the District court to the contrary were reversed on appeal. Thus the plaintiffs did not "cross the statutory threshold" or meet the "absolute limitation" required for prevailing party status on such theory, claim or decree reviewed on appeal.

On the question of whether plaintiffs are entitled to limited fees for acting as a so-called "catalyst" of legal change, we conclude that *Loudermill v. Cleveland Board of Education*, 844 F.2d 304 (6th Cir.), cert. denied, 109 S. Ct. 363, 377 (1988), cited by plaintiffs, does not hold or suggest that legal fees should

be awarded in the instant case on the main claims presented by plaintiffs or with respect to the case as a whole on the merits. There the plaintiff established in this Court and the Supreme Court a valid procedural due process claim that he was entitled to a pretermination hearing as a tenured public employee, a right not previously recognized. This was a significant legal victory which "changed the legal relationship" of the parties by articulating a new right of procedural due process governing their relationship, even though the plaintiff lost in the end because it was established that he had received the required hearing. Here the plaintiffs have created no similar new legal right. They have attempted to do so, but they have failed in this attempt. Consequently, plaintiffs may not be characterized as "prevailing parties." Plaintiffs are not entitled to prevailing party status simply because they have presented an interesting argument or a difficult case. They must prevail on some significant claim or legal theory.

Our decision on prevailing party status is limited to the case as a whole on the merits. We do not intend to rule on the question of plaintiffs' rights to attorneys fees for any interim injunctive decrees or protective orders maintaining the status quo that were not appealed. Our decision is without prejudice to the rights of plaintiffs to apply for fees under § 1988 for the more limited injunctive decrees of November 29, 1983 and December 5, 1983 (recall rights) or other limited injunctive decrees not appealed and reversed. We express no opinion concerning plaintiff's claim for a limited award of attorneys fees for work leading to these decrees. Not is our decision denying prevailing party status to plaintiffs on the case as a whole intended to deprive the District court of jurisdiction to entertain requests for attorneys fees for obtaining the more limited decrees referred to above in this paragraph.

Accordingly, the judgment of the district court declining to award attorneys fees on the case as a whole is affirmed, albeit on different grounds than those articulated below.